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The Conundrum of Corporate Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions

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THE CONUNDRUM OF CORPORATE CRIMINAL LIABILITY: SEEKING A CONSISTENT APPROACH TO THE CONSTITUTIONAL RIGHTS OF CORPORATIONS IN CRIMINAL PROSECUTIONS

PETER J. HENNING*

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The United States Supreme Court has struggled with the Constitutional rights of corporations since shortly after the adoption of the Constitution. At various times in the nineteenth century, the Court described a corporation as "[t]hat invisible, intangible, and artificial being, that mere legal entity";¹ "an artificial being, invisible, intangible, and existing only in contemplation of law";² "an artificial body of men, composed of diverse constituent members";³ and an "artificial person[] created by the legislature, and possessing only the attributes which the legislature has prescribed."⁴ Yet, these descriptions of the ontological status of the corporation failed to assist the Court in developing a consistent theory for determining the constitutional rights of corporations.

During the nineteenth century the Court held that corporations were "Citizens" of a state for the purpose of determining federal diversity jurisdiction,⁵ but not "Citizens" protected by the Privileges and Immunities Clause of Article IV.⁶ This confusion continued into the twentieth century.

1. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 86 (1809).

2. *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819).

3. *Louisville, C. & C.R.R. v. Letson*, 43 U.S. (2 How.) 497, 552 (1844).

4. *Paul v. Virginia*, 80 U.S. (8 Wall.) 168, 177 (1868).

5. U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, . . . between Citizens of Different States . . ."). In *Deveaux*, the Court held that corporations were citizens in order to determine whether they met the requirements for federal jurisdiction. *Deveaux*, 9 U.S. (5 Cranch) at 87-88. The Court stated:

[A corporate] name, indeed, cannot be an alien or a citizen; but the persons whom it represents may be the one or the other; and the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom the suit may be instituted. Substantially and essentially, the parties in such a case, where the members of the corporation are aliens, or citizens of a different state from the opposite party, come within the spirit and terms of the jurisdiction conferred by the constitution [sic] on the national tribunals.

Id.

6. U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."). In 1839, the Court held that a corporation created in one state may not claim the same protection as a natural person when it enters another state. *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 586-87 (1839). In *Paul v. Virginia*, 80 U.S. (8 Wall.) 168 (1868), which affirmed the holding in *Earle* after the adoption of the Fourteenth Amendment, the Court stated:

But in no case which has come under our observation, either in the State or Federal courts, has a corporation been considered a citizen within the meaning of that provision of the Constitution, which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several states.

Id. at 178.

Rather than deny⁷ constitutional rights to this artificial being based on its status as only a legal entity, the Court has followed a seemingly *ad hoc* approach to the question of which constitutional rights a corporation can assert.⁸ In 1906, the Supreme Court held in *Hale v. Henkel*⁹ that a corporation does not have a Fifth Amendment privilege against self-incrimination because the right applies to natural persons and not corporations.¹⁰ At the same time, the Court permitted the corporation to challenge the government's seizure of corporate records on Fourth Amendment grounds.¹¹ The Fourth Amendment provides that "the right of the *people* to be secure in their persons, houses, papers, and effects" shall not be violated,¹² while the Fifth Amendment grants certain rights to any "person."¹³ Therefore, no textual basis explains *Hale v. Henkel*'s discordant treatment of the corporation in criminal proceedings.¹⁴

The Court's determination that a corporation can assert the Fourth Amendment to prevent the government from searching or seizing records but not a Fifth Amendment privilege to refuse compelled production of the same records may strike one at first blush as inconsistent. But the line

7. See, e.g., U.S. CONST. amend. XIV, § 1 ("nor deny to any person within its jurisdiction the equal protection of the laws."). In *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U.S. 394 (1886), the Court summarily stated that it did "not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does." *Id.* at 396; see *infra* notes 25-54 and accompanying text (discussing the nineteenth century development of the constitutional status of corporations).

8. See Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 *Hastings L.J.* 577, 662 (1990) ("The lack of a consistent basis for according corporations constitutional guarantees is all the more puzzling as the demand for corporate protection increases."); Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 *U. CHI. L. REV.* 1441, 1467 (1987) (stating that the legal status of the corporation "proved to be one of the most confusing jurisprudential problems of the late nineteenth and early twentieth centuries"); Note, *Constitutional Rights of the Corporate Person*, 91 *YALE L.J.* 1641, 1644-45 (1982) ("There is no way to bring unity to these many decisions [on corporate constitutional rights], for they rest on radically different conceptions of the person whose rights and duties receive judicial definition.").

9. 201 U.S. 43 (1906).

10. *Id.* at 75-76; see *Braswell v. United States*, 487 U.S. 99, 108-09 (1988) (explaining that the Fifth Amendment privilege does not apply to "collective entities").

11. *Id.* at 76.

12. U.S. CONST. amend. IV (emphasis added).

13. U.S. CONST. amend. V.

14. Cf. Michael D. Rivard, Comment, *Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species*, 39 *UCLA L. REV.* 1425, 1465 (1992) (arguing that conflicting treatment of corporation's Fourth and Fifth Amendment rights "is a post hoc rationalization rather than an application of principled theory").

drawn by the Court in *Hale v. Henkel* makes sense in light of the purposes of the two constitutional protections and their relation to the government's need to prosecute economic crimes by corporate, as opposed to individual, actors. A corporate right to assert the privilege against self-incrimination could completely frustrate the criminal prosecution of corporate wrongdoing, a justification identified by the Court in *Hale v. Henkel* for refusing to extend the Fifth Amendment privilege to a corporation.¹⁵ Because the Fourth Amendment, on the other hand, protects against unreasonable government intrusions, allowing corporations to assert that right would not insulate a corporation from enforcement of the criminal law.¹⁶

A closely related issue the Court had to consider in the wake of *Hale v. Henkel* was the scope of the corporation's potential criminal liability for the acts of corporate agents. In *New York Central & Hudson River Railroad Co. v. United States*,¹⁷ the Supreme Court adopted the *respondeat superior* theory of liability for corporations, imposing criminal liability "by imputing [the agent's] act to his employer and imposing penalties upon the corporation for which he is acting in the premises."¹⁸ The recognition of corporate criminal liability in *New York Central* was not an isolated event, much less an aberration. It was a vital part of the Supreme Court's consideration of the applicability of the Constitution's criminal protections to business organizations that rejected anthropomorphizing the corporation. The *respondeat superior* theory of liability was consistent with *Hale v. Henkel*'s treatment of corporate criminal rights because that theory gave the Court flexibility to determine the scope of protection for corporate defendants under the Constitution without simply equating corporations to individuals.

Hale v. Henkel's analysis and *New York Central*'s adoption of broad corporate criminal liability provided the basis for developing a coherent framework for appraising the constitutional rights of corporate defendants.

15. *Hale v. Henkel*, 201 U.S. at 74. The Court justified its decision to reject the corporation's assertion of the privilege against self-incrimination on the ground that permitting a corporate officer to invoke the privilege to refuse the production of business records "would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers." *Id.* Compare Joseph M. Proskauer, *Corporate Privilege Against Self Incrimination*, 11 COLUM. L. REV. 445, 450 (1911) (asserting contemporaneously with *Hale v. Henkel* that "[i]t is impossible to frame a logical theory consistent with these precedents that shall exclude [corporations] from the connotation of 'person' in the Fifth Amendment") with Henry T. Terry, *Constitutional Provisions Against Forcing Self-Incrimination*, 15 YALE L.J. 127, 129 (1906) (pre-*Hale v. Henkel* law review article advocating restricting the privilege against self-incrimination because it "cripples the administration of the criminal law, and makes it an almost useless weapon against the evils and abuse of combination").

16. See *infra* text accompanying notes 124-30 (discussing rationale of providing corporations with Fourth Amendment rights).

17. 212 U.S. 481 (1909).

18. *Id.* at 494.

Yet, the Court frequently failed to follow the thrust of *Hale v. Henkel*, often neglecting to consider the initial question of whether a corporation can invoke the protection of a constitutional provision before deciding the scope of the provision.¹⁹ Outside of the Fourth Amendment, the Court does not

19. In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), the Supreme Court considered a First Amendment claim by a national bank concerning restrictions on corporate contributions to political campaigns. *Id.* at 770. The Court, in a footnote, stated that the distinguishing characteristic in the corporate constitutional rights cases was whether the right involves "[c]ertain 'purely personal' guarantees, such as the privilege against compulsory self-incrimination, [that] are unavailable to corporations and other organizations because the 'historic function' of the particular guarantee has been limited to the protection of individuals." *Id.* at 779 n.14. Describing the analysis as focusing on whether a right is "purely personal" is meaningless because every constitutional right is "personal," in that any individual can claim protection. Under this simplistic approach, any corporate organization should also be able to claim every right because a corporation is recognized as a legal actor capable of being a "citizen" and "person" for constitutional purposes. There is no obvious means of determining how a right rises to the level of being "purely" personal, or only qualifying as somewhat personal, short of the Court announcing a test for what constitutes an individual, non-corporate right. That, however, is the very point of calling a right "purely personal." See also *Pacific Gas & Elec. Co. v. California Pub. Util. Comm'n*, 475 U.S. 1, 23 (1986) (Rehnquist, J., dissenting) (arguing that the first amendment right not to be forced to speak should not extend to corporations because "[t]o ascribe to such artificial entities an 'intellect' or 'mind' for freedom of conscience purposes is to confuse metaphor with reality.").

The Court's decision in *Hale v. Henkel* belies the facile statement in *Bellotti* that there is a simple test to determine a corporation's constitutional rights. The Fourth Amendment is generally considered to be the principal means of protecting the individual right to privacy, and it is hard to conceive how a business organization, especially one that has a large number of employees, can have much if any privacy compared to the individual. Yet, the Court in *Hale v. Henkel* readily acknowledged the corporation's rights under the Fourth Amendment. *Hale v. Henkel*, 201 U.S. at 76. That unquestioning acceptance of the constitutional protection raises a difficult question: Why can a corporate entity be forced to incriminate itself? If a corporation can assert a right of privacy, how much more difficult is it to conceive that it should have the "purely personal" right to prohibit the government from making the corporation convict itself by use of its own words? *Hale v. Henkel* certainly did not rest on the vacuous ground that the Fifth Amendment right is purely personal while Fourth Amendment protection is not.

The "purely personal" test described in *Bellotti* cannot explain why the Double Jeopardy Clause should apply to a corporation when one of the Clause's principal rationales was to protect a defendant from "embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." *Green v. United States*, 355 U.S. 184, 187-88 (1957). Nevertheless, in *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), the Court rejected on double jeopardy grounds the government's appeal of a judgment of acquittal entered on behalf of a corporation after the jury deadlocked. *Id.* at 575. The Court did not explain how a corporation could feel the "anxiety and insecurity" of a possible second trial and qualify for a Fifth Amendment right that appears to be as "purely personal" as the privilege against self-incrimination denied to corporations in the same amendment. See *infra*

acknowledge explicitly that corporations have only abbreviated constitutional protection as compared to individuals. By refraining from asking the foundational question about the corporation's right to constitutional protection in a criminal prosecution, the Court appears to operate on the blind assumption that constitutional protections apply to corporate defendants to the same extent that they apply to individual defendants.²⁰

If the Court were to address the question of corporate criminal constitutional rights directly, it would first have to consider whether a corporation has any right to claim the protection of a constitutional provision, and then decide whether the protection is coextensive with the right afforded to the individual. The Court's analysis of the rights of businesses under the Fourth Amendment reflects such a weighing of the scope of protection because the Court acknowledges that the breadth of the organization's right is not as great as that recognized for individuals. This Article proposes that such an explicit analysis be done for other criminal

text accompanying notes 223-321 (analyzing corporate double jeopardy right).

20. For example, in *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), the Court prohibited on double jeopardy grounds the government's appeal of a judgment of acquittal entered on behalf of two corporations and an individual defendant. *Id.* at 575. It did not address, however, why the Fifth Amendment's Double Jeopardy Clause applies to a corporation when the Self-Incrimination Clause does not, despite the fact that they are grouped together in the same constitutional amendment that applies to "any person." Similarly, the Court's earlier *per curiam* decision in *Fong Foo v. United States*, 369 U.S. 141 (1962), did not address the question of whether a corporation could claim the protection of the Double Jeopardy Clause. Instead, the brief opinion merely asserted that the "constitutional provision is at the very root of the present case" without stating why a corporation should receive a protection afforded by the Fifth Amendment. *Id.* at 143.

The apparently inconsistent treatment of the Fifth Amendment continued in the Ninth Circuit's conclusion that the Grand Jury Clause of the Fifth Amendment does not apply to a corporate defendant because it could not be convicted of an "infamous crime." See *United States v. Yellow Freight Sys., Inc.*, 637 F.2d 1248, 1254 (9th Cir. 1980) ("Regulatory crimes, such as those charged in this case, are not inherently infamous."); *United States v. Armored Transp., Inc.*, 629 F.2d 1313, 1319 (9th Cir. 1980) ("The potential punishment must be infamous, and a fine, levied against either an individual or a corporation, simply does not fit within the meaning of that word, as interpreted by the Supreme Court.").

The Supreme Court recently recognized in *United Mine Workers v. Bagwell*, 114 S. Ct. 2552 (1994), a union's Sixth Amendment right to trial by jury in a criminal contempt proceeding. *Id.* at 2562. Similar to *Martin Linen Supply*, the Court never confronted whether an organization can claim the jury trial right. Instead, it just assumed the right's applicability to a legal entity in deciding the constitutional question. Despite *Bagwell's* recognition of the jury trial right for an organization, there is a serious question whether a corporation can receive any protection under the Assistance of Counsel Clause of the Sixth Amendment. See *Scott v. Illinois*, 440 U.S. 367, 389 (1979) (holding that the right to appointed counsel only applies when the defendant is sentenced to a term of imprisonment).

constitutional rights, consistent with the approach adopted in *Hale v. Henkel*.²¹

21. The analysis proposed here accepts, and even argues in favor of, the *respondeat superior* theory of corporate criminal liability as consistent with the proper determination of corporate criminal constitutional rights. This theory has been severely criticized as being in conflict with the basic principles of criminal law, and scholars have advanced a number of proposals for reforming the theoretical concept of corporate criminal liability. Perhaps the most far-reaching theory for reshaping corporate criminal liability has been offered by Professor Pamela Bucy, who argues for a "Corporate Ethos" paradigm. Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1103 (1991) [hereinafter Bucy, *Corporate Ethos*]. Her analysis would identify corporate intent by requiring the government to prove that the business entity has a distinct and identifiable personality that "encouraged agents of the corporation to commit the criminal act." *Id.* at 1103. Other proposed methods for proving corporate intent involve establishing an "objective standard of reasonableness" based on evidence of primary action and intention by the corporation, William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 647, 677 (1994); determining a corporation's liability based on its reaction to the criminal act of its agent, Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1183 (1983); and ascertaining intent through a corporation's failure to make reasonable efforts to implement policies and procedures to prevent criminal acts by its agents. Developments in the Law—*Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1257 (1979). One proposal would eliminate all corporate criminal liability in favor of civil enforcement actions. V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1533 (1996).

A shortcoming with focusing on the acts of the corporate entity to a particular *mens rea* separate from the individual agent's is that by treating the corporation as a completely separate actor, the government will have to amass a large body of evidence that may be wholly unrelated to the charged criminal act to demonstrate the elusive intent of an incorporeal entity. In order to establish that intent element beyond a reasonable doubt, these theories seek to mimic, to the extent possible, what must be established in a criminal prosecution against a natural person. The theories apparently assume that the corporation is a "person" that should be treated identically to an individual defendant. See, e.g., Laufer, *supra*, at 683 (arguing for a "reasonable man" standard for judging the acts of the corporation to determine whether there is evidence of its intent); Bucy, *Corporate Ethos*, *supra*, at 1099 ("In a sense, this corporate ethos standard takes its cue from notions of intent developed in the context of individual liability. . . . If the individual committed the act purposely, we consider it to be a crime, while if the individual committed the act accidentally, we do not. Similarly, the standard proposed herein imposes criminal liability on a corporation only if the corporation encouraged the criminal conduct at issue.").

These proposals for corporate criminal liability either overlook or take for granted the answer to the concomitant question of what rights the corporate defendant is entitled to under the Constitution. By aligning the position of the corporation as closely as possible with natural persons, the implicit response may be that the corporation could assert all the constitutional rights that an individual could. Simply ascribing the rights of individual defendants wholesale to corporations could make the prosecution of corporate wrongdoing virtually impossible under the new theories of corporate intent. See *id.* at 1172-75 (noting

The initial determination of whether a constitutional right should apply to a corporate criminal defendant should be based on the fundamental premise that the corporation's sole interest is protection from abuse of the government's power to investigate, prosecute, and sanction illegal conduct. Arguably, corporations do not have the human dignity interests that constitutional rights can also preserve.²² The Court first should compare the possibility of abuse with the effect of permitting a corporation to assert the right and the government's ability to enforce the law effectively. It then should determine whether there is a substantial likelihood that, absent the constitutional protection, the government will abuse a power that might lead to a questionable conviction of a corporate defendant. Only through this weighing of the effects of such an abuse of power can the Court determine the degree of protection a corporation merits under the Constitution in a criminal prosecution. This approach acknowledges that a corporation has no *a priori* claim to a specific constitutional right, and its interests can be outweighed by the necessity of preserving the government's capability to support a productive law enforcement program when the potential for abuse is not significant.²³

The proposed approach is consistent with the Supreme Court's analysis of corporate rights first undertaken in *Hale v. Henkel*. Since that decision, the Court has rejected corporate claims to the privilege against self-incrimination. This has been mainly because permitting the assertion of the right would have a deleterious effect on the enforcement of regulatory provisions, which were designed to curb corporate misconduct. Neverthe-

potential Confrontation Clause problems with the *Corporate Ethos* standard of criminal liability). Yet, the proposals requiring proof of a separate corporate intent appear to assume that the corporation cannot assert any constitutional protection to shield information from the government, despite the fact that they are being treated as separate from their individual agents. See, e.g., Laufer, *supra*, at 709-10 ("Evidence that supports a determination of constructive fault is easier to gather than the circumstantial and direct evidence submitted in cases of vicarious fault."). While the *respondeat superior* theory of liability is open to criticism, that analysis must be understood as part of a broader approach to the constitutional rights of corporations. See *infra* notes 131-37 and accompanying text (noting the close relationship between *Hale v. Henkel* and *New York Central*).

22. See WAYNE R. LAFAYE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 1.6(g) (2d ed. 1992) [hereinafter LAFAYE & ISRAEL] (stating that in the context of the criminal justice system, "[t]he concept of human dignity . . . is far from precise, but it may be described roughly as encompassing the basic needs of the human personality, including privacy, autonomy, and freedom from humiliation and abuse"). For example, the Supreme Court has explained that the policy supporting the Double Jeopardy Clause is to protect individuals from having to live in a "continuing state of anxiety and insecurity" if they had to face a second prosecution for the same misconduct. *Green v. United States*, 355 U.S. 184, 187 (1957).

23. The proposed analysis does not incorporate any aspect of proportionality, that larger corporations should receive less protection than smaller corporations.

less, the Court does not permit the government to make full use of the act of producing corporate documents against the individual custodian.²⁴ Under the Fourth Amendment, the Court acknowledges a limited corporate right that is not coextensive with the protection afforded to the individual. Yet, it still recognizes that denying corporations all protection from unreasonable searches and seizures would give the government *carte blanche* to abuse its power.

Part I of this Article reviews the Supreme Court's development of the constitutional status of the corporation, and Part II analyzes the related trend in the federal courts of government prosecution of criminal actions against corporate entities. Part III reviews the seminal decision in *Hale v. Henkel*, with careful attention to the historical and economic contexts in which the Court granted limited constitutional protections to corporations in criminal cases. Part IV discusses the development of corporate rights under the Self-Incrimination Clause and the Fourth Amendment to demonstrate that the balancing of interests adopted in *Hale v. Henkel* continues in the Court's analysis of those provisions. Part V reviews the Double Jeopardy and Indictment Clauses of the Fifth Amendment, and analyzes conflicting treatment of the corporation's rights in the same amendment. Part VI studies the three principal rights granted by the Sixth Amendment, the right to a jury trial, confrontation of witnesses, and assistance of counsel, to determine the degree of protection a corporation should be afforded under those rights in a criminal prosecution.

I. THE SUPREME COURT AND CORPORATIONS: PERSONS AND CITIZENS IN FEDERAL COURTS

A. Corporations as "Citizens"

The American economy at the time of the adoption of the Constitution was predominantly agrarian, with most industrial production conducted in individual enterprises or small partnerships, rather than complex business organizations.²⁵ The state and federal governments chartered a limited number of corporations, granting narrow powers to conduct specific businesses; most involved quasi-public franchises, such as utilities or transportation-related activities.²⁶ The accepted theory of the corporation

24. See *infra* text accompanying notes 151-55 (discussing limitation imposed on use of custodian's production of business records in *Braswell v. United States*).

25. See William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1483 (1989) ("Economic units tended to be individual rather than collective. Individuals produced goods for sale in the market.").

26. See JAMES W. HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970*, 7-8 (1970); Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L.Q. 393, 405

at that time was that it existed only as an artificial entity through the concession granted by the sovereign.²⁷ This "concession theory" of corporate existence meant that the government retained extensive power over the continued operation of the enterprise.

As merely an artificial being existing only with the acquiescence of the state, one would expect that analysis of a corporation's constitutional status would be straightforward because Constitutional protection extends only to "Persons" and "Citizens." In *Bank of the United States v. Deveaux*,²⁸ however, the Supreme Court stated that "corporations have been included within terms of description appropriated to real persons."²⁹ Based on this finding, the Court held that corporations qualify as "Citizens"³⁰ for the purpose of invoking the diversity jurisdiction of the federal courts.³¹ The Court acknowledged the artificial status of the corporate entity "as a mere creature of the law, invisible, intangible, and incorporeal."³² Yet, it justified the decision by noting that "the term citizen ought to be understood as it is used in the Constitution, and as it is used in other laws. That is, to describe the real persons who come into court, in this case, under their corporate name."³³ Thus, the Court looked beyond the organizational structure to find natural persons, the owners of the entity, who met the condition of being citizens empowered by the Constitution to invoke federal judicial authority.³⁴

(1982) ("The more typical colonial corporation was quasi-public in character and was established to improve public transportation facilities.").

27. See Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 FLA. ST. U. L. REV. 1061, 1064 (1994); Mark, *supra* note 8, at 1447; Bratton, *supra* note 25, at 1484; Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 184 (1985).

28. 9 U.S. (5 Cranch) 61 (1809).

29. *Id.* at 88.

30. U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases . . . between Citizens of Different States.").

31. *Deveaux*, 9 U.S. (5 Cranch) at 91-92.

32. *Id.* at 88.

33. *Id.* at 91.

34. The Supreme Court's assertion in *Deveaux* that the citizenship of the shareholders was sufficient to meet the requirement for diversity jurisdiction did not pass unchallenged. In *Louisville, Cincinnati & Charleston Railroad Co. v. Letson*, 43 U.S. (2 How.) 497 (1844), the Court held that a corporation chartered by a state was deemed a citizen of that state for the purpose of suing and being sued.

A corporation created by a state to perform its functions under the authority of that state, and only suable there, though it may have members out of the state, seems to us to be a person, though an artificial one, inhabiting and belonging to the state, and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that state. *Id.* at 555. In *Marshall v. Baltimore & Ohio Railroad Co.*, 57 U.S. (16 How.) 314 (1853), the Court shifted the conceptual basis of corporate diversity jurisdiction back to the analysis

Along with the right to sue in federal court, the Court early on permitted a corporation to assert directly that a state action could violate its own constitutional rights, as opposed to the rights of its owners. In *Trustees of Dartmouth College v. Woodward*,³⁵ the Court held that the Contracts Clause³⁶ prohibited a state from enacting a statute that interfered with a corporation's charter by changing the governance structure for an educational institution.³⁷ The Court explained that the corporate character of the party asserting the constitutional violation was immaterial because "the body corporate, as possessing the whole legal and equitable interest, and completely representing the donors, for the purpose of executing the trust, has rights which are protected by the constitution."³⁸

B. "Citizens" and "Persons" Before the Court

While in the nineteenth century the Court had no trouble concluding that a corporation could rely on the citizenship of its shareholders for diversity jurisdiction and could sue for alleged violations of its own constitutional rights, it also held that a corporation was not a "Citizen" protected by the Privileges and Immunities Clause.³⁹ In *Bank of Augusta v. Earle*,⁴⁰ the Supreme Court rejected an expansion of *Deveaux* by denying protection from state regulation to corporations operating in a state other than that

adopted in *Deveaux* by creating a conclusive presumption that all of a corporation's shareholders were citizens of the state which granted the charter.

If the declaration sets forth facts from which the citizenship of the parties may be presumed or legally inferred, it is sufficient. The presumption arising from the habitat of a corporation in the place of its creation being conclusive as to the residence or citizenship of those who use the corporate name and exercise the faculties conferred by it . . . is a sufficient averment that the real defendants are citizens of that State.

Id. at 329. *Marshall's* conclusive presumption has been called the "purest fiction." CHARLES A. WRIGHT, *LAW OF FEDERAL COURTS* 165 (5th ed. 1994). Under 28 U.S.C. § 1332(c) (1994), a corporation is a citizen of its state of incorporation and the state of its principal place of business. The statute, of course, simply adopts the initial assumption of *Deveaux* that a corporation is a "Citizen" under Article III.

35. 17 U.S. (4 Wheat.) 518 (1819).

36. U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts.").

37. *Woodward*, 17 U.S. (4 Wheat.) at 652. New Hampshire sought to take control of Dartmouth College through a statute that amended the college's charter to increase the number of trustees who could be appointed by the governor. *Id.* The Court stated: "The will of the state is substituted for the will of the donors, in every essential operation of the college. This is not an immaterial change." *Id.*

38. *Id.* at 654.

39. U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

40. 38 U.S. (13 Pet.) 519 (1839).

which chartered them.⁴¹ And, approximately thirty years later, in *Paul v. Virginia*,⁴² the Court unanimously reaffirmed that position. In *Paul*, the Court held that states "may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."⁴³ The Court justified this holding by analogizing the grant of a corporate charter to a special privilege that need not be recognized outside the borders of the granting state.⁴⁴

Justice Field, who wrote the opinion in *Paul*, found that "[t]he term citizens . . . applies only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the Legislature, and possessing only the attributes which the legislature has prescribed."⁴⁵ Yet, three years later in *The Railroad Tax Cases*,⁴⁶ in which he sat as a Circuit Justice, Justice Field invalidated a state tax claim, agreeing with a railroad corporation's assertion that the state's tax assessments discriminated against corporations in violation of the Equal Protection Clause of the Fourteenth Amendment:

Whatever acts may be imputed justly or unjustly to the corporations, they are entitled when they enter the tribunals of the nation to have the same justice meted out to them which is meted out to the humblest citizen. There cannot be one law for them and another law for others.⁴⁷

41. *Id.* at 587. The Court stated:

Whenever a corporation makes a contract, it is the contract of the legal entity; of the artificial being created by the charter; and not the contract of the individual members. The only rights it can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a state [sic] . . .

Id.

42. 80 U.S. (8 Wall.) 168 (1868).

43. *Id.* at 181. The Court rejected the challenge of out-of-state insurers to a Virginia statute requiring them to obtain a license and deposit a bond with the state treasurer before writing insurance policies. *Id.*

44. *Id.* at 180.

45. *Id.* at 177. With regard to the application of the Privileges and Immunities Clause to the rights of foreign corporations, Professor Tribe argues:

The plainly manipulable and at times anachronistically metaphysical character of these doctrines and the dubious consistency of their complex exceptions suggest that the Supreme Court has preserved them with an eye to their discretionary application in order to prevent what appear to be instances of intolerable local or state interference with interstate markets.

LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-14 (2d ed. 1988).

46. 13 F. 722 (C.C.D. Cal. 1882).

47. *Id.* at 730.

In *Santa Clara County v. Southern Pacific Railroad*,⁴⁸ the Supreme Court affirmed *The Railroad Tax Cases* in a terse statement authored by Chief Justice Waite. The Court did not wish to hear argument on the applicability of the Equal Protection Clause to corporations because “[w]e are all of the opinion that it does [apply].”⁴⁹ Thus, without the slightest effort to explain its inconsistent treatment of the corporation’s status as a “Citizen” or “Person” under the Constitution, the Court announced a position granting corporations broad protection under one provision of the Fourteenth Amendment while in other cases ostensibly adhering to a theory that views the corporation as an entity with only limited powers subject to the control of the sovereign.

The status of corporations in the economic and legal landscape changed dramatically during the nineteenth century. By the end of the century, states moved away from granting limited corporate charters toward permitting businesses to incorporate freely and to operate for any legal purpose.⁵⁰ The concept of the corporation also began to shift away from the “artificial entity” theory expounded in the earlier cases.⁵¹ A new understanding of the corporation began to emerge, that the business organization was a “real entity” apart from its particular incorporators or owners, with distinct rights and obligations.⁵²

When the Supreme Court held in *Santa Clara County* that the Equal Protection Clause applied to corporations, there was no dominant theory of corporate existence to explain why that portion of the Fourteenth Amendment reached a corporate entity but the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment did not.⁵³ The Court’s

48. 118 U.S. 394 (1886).

49. *Id.*; see *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888) (“Under the designation of person there is no doubt that a private corporation is included.”).

50. See Mark, *supra* note 8, at 1455 (“The transformation of the private law of corporations from 1819 to the 1920s is best described as a move from a circumstance in which a corporation could do only those things specifically allowed by its charter to one in which a corporation could do anything not specifically prohibited to it.”).

51. See Bratton, *supra* note 25, at 1489 (stating that theorists on corporations “rejected the earlier doctrinal notions of the corporation as ‘legal fiction’ and ‘artificial entity’”); Mark, *supra* note 8, at 1457 (“In the 1880s it appeared that the time was ripe for a new approach to the corporation. The collapse of the fictive conception of the corporation was evident.”).

52. For excellent reviews of the development of the philosophical theories of the corporation, see Mark M. Hager, *Bodies Politic: The Progressive History of Organizational “Real Entity” Theory*, 50 U. PITT. L. REV. 575 (1989); Mark, *supra* note 8; Horwitz, *supra* note 27.

53. See Horwitz, *supra* note 27, at 178 (explaining that the “real entity” theory that is attributed to *Santa Clara County* “in fact only emerged some time after” the case was decided).

approach to corporations in the nineteenth century showed an amazing flexibility that permitted it to interpret the same term, "Citizens," to both include and exclude corporate entities. As corporations assumed greater economic importance, their demands for legal protection could only increase. The Court did not embrace a mode of analyzing corporate constitutional rights that required adherence to one philosophical conception of corporate existence. In fact, the Court has never adopted a single test for applying constitutional rights to corporations, at least in part because it has never agreed upon a single understanding of what a corporation is for constitutional purposes.⁵⁴

The Court's nineteenth century decisions dealt exclusively with civil actions, and the constitutional provisions at issue involved government regulation or protection of private rights. By the early twentieth century, the Court faced a new challenge as the federal government began to regulate businesses through criminal sanctions. Corporations sought to extend the rationale of constitutional protection from the context of private relationships and civil causes of action to criminal prosecutions, arguing that the protections granted by the Fourth and Fifth Amendments applied to corporate as well as individual defendants.

II. THE ORIGINS OF FEDERAL CRIMINAL PROSECUTIONS OF CORPORATIONS: ARTIFICIAL EXISTENCE AS A SHIELD TO CRIMINAL LIABILITY

As corporations assumed a greater role in the national economy in the late nineteenth century,⁵⁵ the federal government responded to alleged corporate excesses by enacting laws designed to curb some of the greatest abuses perceived to arise from these large economic combinations.⁵⁶ The two most important provisions from this era that imposed criminal liability on corporations for economic crimes were the Interstate Commerce Act and

54. Compare *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) ("[w]e need not survey the outer boundaries of the [First] Amendment's protection of corporate speech, or address the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment.") with *id.* at 823-24 (Rehnquist, J., dissenting) ("Since it cannot be disputed that the mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons, our inquiry must seek to determine which constitutional protections are 'incidental to its very existence.'") (citation omitted) (quoting *Trustee of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819)).

55. See Bratton, *supra* note 25, at 1487 ("Management corporations appeared around 1890. . . [as] large corporations performing multiple tasks of production and marketing. The new corporations produced an array of goods cheaply and in quantity.").

56. See Mayer, *supra* note 8, at 585 ("The federal government did intercede in the economy during this period, but almost always in a sporadic manner for economic (as opposed to environmental or social) purposes.").

its progeny,⁵⁷ and the Sherman Antitrust Act of 1890.⁵⁸ Corporations promptly challenged the government's power to regulate business practices through the criminal laws by arguing first that they were not amenable to the criminal law, and then by turning to the Constitution as a potential source of protection.⁵⁹

The classic view of the corporation's potential criminal liability, as expressed by Blackstone, was that a corporation could not be held liable for a crime, although individual members could be punished for corporate acts.⁶⁰ But by the mid-nineteenth century, civil law principles of corporate

57. Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887); Act of Mar. 2, 1889, ch. 382, 25 Stat. 855 (1889); Elkins Act, ch. 708, 32 Stat. 847 (1903); Hepburn Act, ch. 3591, 34 Stat. 584 (1906). The original Interstate Commerce Act did not have criminal provisions; these were added in the later acts. The various acts prohibited shippers and carriers from paying or receiving any "rebate, concession, or discrimination" at less than a published rate. 49 U.S.C. § 41(1) (1964) (repealed 1978). In *New York, New Haven & Hartford Railroad Co. v. Interstate Commerce Commission*, 200 U.S. 361 (1906), the Supreme Court stated:

It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve.

Id. at 391. Ironically, the recent trend toward diminishing federal regulation has claimed the ICC as one of its casualties, and the agency ceased to exist as of January 1, 1996. See David E. Sanger, *A U.S. Agency, Once Powerful, Is Dead at 108*, N.Y. TIMES, Jan. 1, 1996, at A1 ("[W]ith the arrival of the new year, something happens to the country's oldest regulatory agency that almost never happens in Washington. It dies at the age of 108.").

58. Act of July 2, 1890, ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1-7 (1994)). In *Northern Securities Co. v. United States*, 193 U.S. 197 (1904), the Supreme Court considered the scope of Congress's power to reach combinations that restrain trade:

If a State may strike down combinations that restrain its domestic commerce by destroying free competition among those engaged in such commerce, what power, except that of Congress, is competent to protect the freedom of interstate and international commerce when assailed by a combination that restrains such commerce by stifling competition among those engaged in it?

Now, the court is asked to adjudge that, if held to embrace the case before us, the Anti-Trust Act is repugnant to the Constitution of the United States. In this view we are unable to concur.

Id. at 342.

59. See, e.g., *Armour Packing Co. v. United States*, 209 U.S. 56 (1908) (attacking the constitutionality of the Elkins Act's jurisdiction on Sixth Amendment grounds); *Northern Secs. Co. v. United States*, 193 U.S. 197 (1904) (attacking the application of the Sherman Act to international commerce).

60. See 1 WILLIAM BLACKSTONE, COMMENTARIES 476 (1765); Michael B. Metzger,

liability seeped into criminal prosecutions as state courts started to allow prosecutors to charge business organizations with crimes for acts performed by their agents on behalf of the company.⁶¹ The important question was whether the corporation could be criminally liable for the acts of an agent whose conduct went beyond the principal's grant of authority.

One late-nineteenth century author professed a narrower regard for corporate criminal liability, arguing that "to render a corporation criminally liable, it must appear that the act was one authorized by the company and not the *mere unauthorized act* of the officer or agent."⁶² Bishop's *Commentaries on the Criminal Law*, one of the leading treatises at the time, took the broader view that "in principle, the limits of the liability to indictment depend chiefly on the nature and duties of the particular corporation, and the extent of its powers in the special matter."⁶³ In developing the answer to this question, the federal courts took the lead in defining the parameters of corporate criminal liability. Although corporations could sue in federal courts by invoking diversity jurisdiction, they sought to avoid criminal prosecutions by arguing that their status as an artificial entity precluded them from being punished for crimes that require proof of the defendant's *mens rea*.

Corporate Criminal Liability for Defective Products: Policies, Problems, and Prospects, 73 GEO. L.J. 1, 47 (1984) ("The common law early rejected any notion that corporations could be held criminally responsible.").

61. See, e.g., *State v. Morris & Essex R.R.*, 23 N.J.L. 360 (1852) (indicting railroad for nuisance for building on a public highway and obstructing passage on the highway); see also Eliezer Lederman, *Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle*, 76 J. CRIM. L. & CRIMINOLOGY 285, 288 (1985) ("[T]he penetration of civil law doctrines into the criminal arena has contributed greatly to the advancement of the principles of corporate criminal liability."); Metzger, *supra* note 60, at 48 (explaining the development of corporate criminal liability facilitated by growth of "public welfare offenses" that impose liability regardless of the actor's intent). Although the early prosecutions were for crimes involving a corporation's failure to act, i.e. nonfeasance, Professor Brickey points out that the distinction between offenses involving nonfeasance and misfeasance was short-lived in the United States. Brickey, *supra* note 26, at 407.

62. 1 EMLIN MCCLAIN, A TREATISE ON THE CRIMINAL LAW § 184 (1897) (emphasis added). McClain goes on to assert:

If a statute imposes a penalty for knowingly and wilfully doing an act which the statute declares wrongful, as, for instance, wilfully converting the property of another or knowingly employing children under a certain age in manufacturing establishments, it is not to be deemed directed against corporations, but against their officers or agents, who alone can knowingly and wilfully do the prohibited act.

Id. This approach would limit a corporation's criminal liability to those acts that the company authorizes the agent to perform, and would deny that a corporation can act with the requisite *mens rea* to wilfully violate a statute because its agents are never authorized to act wrongfully.

63. 1 JOEL PRENTISS BISHOP, CRIMINAL LAW § 423 (9th ed. 1923).

The first reported federal case to consider the criminal liability of a corporation for the acts of its agents was *United States v. Baltimore & Ohio Railroad Co.*,⁶⁴ in which a railroad was indicted for violating a revenue act by not having the proper tax stamps on shipping documents.⁶⁵ Chief Justice Chase, sitting as a Circuit Justice, was "inclined" to reject the defendant's argument that the company agent's intent "could not be imputed to a corporation having no sentient or visible tangible being, and existing only in contemplation of law."⁶⁶ The opinion, however, did not state the reason for this inclination, and "[u]pon this intimation of opinion . . . the cases were settled by counsel."⁶⁷

In *United States v. John Kelso Co.*,⁶⁸ a federal district court held that a corporation could be liable for a crime whose *mens rea* element required proof that the defendant intended to commit the alleged act.⁶⁹ The government charged a corporation with violating an eight-hour workday statute, and the defendant argued that a corporation was incapable of forming any intent.⁷⁰ The company's argument sought to use its corporate existence as a shield from liability by asserting that while a corporation's actions might violate the law, the organization itself could not intend for there to be a violation, and therefore it could not be prosecuted.⁷¹ In rejecting the company's claim, the court explained that, if it were to accept the argument, then it would exempt corporations from punishment for any violation of the statute and they "would be given a privilege denied to a natural person."⁷² The decision in *John Kelso Co.* showed that federal regulatory statutes, such as the one setting an eight-hour workday, would be hamstrung if the court accepted a defense based on the status of the corporation as an artificial entity.⁷³

64. 24 F. Cas. 972 (C.C.D. W. Va. 1868)(No. 14,509).

65. *Id.* at 972-73.

66. *Id.* at 972-73.

67. *Id.* at 973.

68. 86 F. 304 (N.D. Cal. 1898).

69. *Id.* at 306.

70. *Id.* at 304-05. The statute made it a misdemeanor for any contractor to "intentionally violate any provision of this act." Act of Aug. 1, 1892, ch. 352, 27 Stat. 340 (1892).

71. *Id.* at 305.

72. *John Kelso Co.*, 86 F. at 307.

73. The district court also explained that there were limits to corporate criminal liability, stating that "there are certain crimes of which a corporation cannot be guilty; as, for instance, bigamy, perjury, rape, murder and other offenses, which will readily suggest themselves to the mind." *Id.* at 306. The court cites no support for this position, but it appears to be a quotation from *Regina v. Great North of England Railway*, 9 Q.B. 315, 326 (1846). Although this statement in *John Kelso Co.* is dicta, it sets forth the general understanding of the period concerning a possible boundary for corporate criminal liability. See, e.g., BISHOP, *supra* note 63, § 422 ("So it is said, that a corporation cannot be guilty of

The court in *John Kelso Co.* recognized a possible limitation on a corporation's potential criminal liability; namely, that the statute at issue must have a punishment "that can be inflicted upon a corporation—as, for instance, a fine."⁷⁴ In *United States v. Van Schaick*,⁷⁵ however, another federal district court rejected the requirement that the statute must provide a punishment amenable to a corporate defendant.⁷⁶ *Van Schaick* concerned a ferry disaster in New York harbor involving the death of over 900 passengers because the operator failed to provide life-preservers, as required by law.⁷⁷ The statute under which the corporate owner and members of the crew were charged provided a sentence of up to ten years at hard labor, but no fine or other penalty short of incarceration.⁷⁸ The corporation argued that it could not be convicted of the crime because there was no sentence that could be imposed on it upon conviction.⁷⁹ The district court rejected this claim, finding that Congress's failure to include a penalty that could be imposed on a corporate defendant was "inadvertent" and that the legislature could not have "intended to give the owner impunity simply because it happened to be a corporation."⁸⁰

While *Van Schaick* may have expounded a broader view of corporate criminal liability than *John Kelso Co.*, the crimes in both cases required proof of the lowest level of *mens rea*: the defendant intended to do the act prohibited without evidence of any higher mental state. In *United States v. MacAndrews & Forbes Co.*,⁸¹ a federal district court extended corporate criminal liability to prosecutions requiring proof of a higher level of *mens rea*.⁸² In that case, three corporations and their individual officers were

an assault, or riot, or other crime involving personal violence, or any felony."); MCCLAIN, *supra* note 62, § 184 ("[I]t is evident there is a large class of crimes, including perhaps all the common law felonies, that cannot be committed by a corporation because criminality is dependent upon the intent with which the criminal act is done.").

74. *John Kelso Co.*, 86 F. at 306.

75. 134 F. 592 (S.D.N.Y. 1904).

76. *Id.* at 602.

77. *Id.* at 594. These cases were named the "Slocum Cases" after a disaster involving the vessel *General Slocum*. The district court noted: "On June 15, 1904, while navigating the East river, a fire occurred, and was so uncontrolled that many persons were compelled to jump into the water, and some 900 were drowned." *Id.*

78. U.S. COMP. STAT. 3629, tit. 70, § 5344 (West 1901).

79. *Van Schaick*, 134 F. at 602.

80. *Id.* In *United States v. Union Supply Co.*, 215 U.S. 50 (1909), a decision handed down shortly after *New York Central's* recognition of corporate criminal liability, the Supreme Court upheld the indictment of a corporation for violating a statutory provision that imposed a fine and imprisonment on the grounds that "when a statute prescribes two independent penalties . . . it means to inflict them so far as it can, and that if one of them is impossible, it does not mean on that account to let the defendant escape." *Id.* at 55.

81. 149 F. 823 (S.D.N.Y. 1906).

82. *Id.*

charged with conspiracy to violate the Sherman Act through a monopoly in licorice paste, a substance used in the manufacture of tobacco.⁸³ The district court rejected the argument that a corporation could not form the specific intent to agree to conspire to violate the law, characterizing that position as "the remnant of a theory always fanciful and in process of abandonment."⁸⁴ Yet, the court did not cite any supporting authority for its holding, asserting only that "[i]t seems to me as easy and logical to ascribe to a corporation an evil mind as it is to impute to it a sense of contractual obligation."⁸⁵

The federal courts had primary responsibility to define the government's power to prosecute corporations because, by the turn of the century, Congress was well on its way toward enacting substantial economic regulatory statutes. The government prosecuted corporations for the first time for crimes, such as conspiracy, that simply never would have been considered appropriate in a period when most business organizations were modest enterprises whose owners were usually well known members of the community and the corporate body operated with limited legal authority under restrictive charters. As a guide to developing this new area of law, the federal courts looked to well-developed principles of tort law that routinely dealt with corporate liability for the acts of agents.⁸⁶

83. *Id.* at 825.

84. *Id.* at 835. The court noted the development of the law up to that point had permitted the prosecution of corporations where the *mens rea* involved the intent to do the act which violated the statute. *Id.*

85. *Id.* at 836; *cf.* *Cohen v. United States*, 157 F. 651, 654 (2d Cir. 1907) (In a bankruptcy fraud prosecution in which the bankrupt corporation was the only party that could be directly prosecuted under the statute, the circuit court stated, "It is immaterial that the corporation was not indicted for conspiracy, or whether it could be indicted. Failure to prosecute all conspirators does not prevent the prosecution of a part of them.").

Shortly after deciding *MacAndrews & Forbes Co.*, the same district court judge concluded that a vehicle for imputing the necessary knowledge to the business organization was the board of directors of the corporation. *United States v. New York Herald Co.*, 159 F. 296 (S.D.N.Y. 1907). In *New York Herald*, the court held that a corporation could have the necessary intent to "knowingly" send certain unmailable matter when the "directors in their official capacity were aware of the insertion in the newspaper of matter obnoxious . . . to the statute." *Id.* at 297. The court concluded that to attribute knowledge from the individual directors to the corporate body "requires no other or different kind of legal inference than has long been used to justify punitive damages in cases of tort against an incorporated defendant." *Id.*

86. It would have been surprising if the federal courts tried to formulate a new analysis for this rapidly developing system of economic regulation on a theoretical basis distinct from the approach taken by civil tort law and already adopted by courts in more rudimentary criminal prosecutions. In *United States v. Alaska Packers' Ass'n*, 1 Alaska 217 (1901), the territorial court stated:

[S]ince a corporation acts by its officers and agents, their purposes, motives, and intent are just as much those of the corporation as are the things done. If, for example, the

III. DEVELOPING THE CONSTITUTIONAL RIGHTS OF CORPORATE DEFENDANTS IN CRIMINAL PROSECUTIONS

The first line of defense to government prosecutions of corporations was the argument that the intent element necessary for a criminal conviction could not be proven against an incorporeal entity that existed only under a charter to conduct lawful business. That position became less tenable, however, as the theoretical concept of the corporation began shifting away from the earlier "artificial entity" conception. In the late nineteenth and early twentieth centuries, writings regarding the nature of the corporate entity poured into the body of legal literature, and theorists began to argue that the corporation was a real being with an existence separate from its agents.⁸⁷ Although the judicial analysis of corporate criminal liability did not exhibit any substantial concern with this changing conception of the corporation, attempts by corporations to rely on their intangible nature as a shield against government regulation certainly cut against the grain of then-current thinking.⁸⁸ Therefore, it was unlikely that a court would accept an argument that exempted business organizations from prosecutions solely because they could not intend to commit a crime due to their "artificial" nature.

If a corporation was a real entity, with an existence similar in some ways to that of natural persons, then it was logical to assert that the same protection afforded to individuals in criminal prosecutions should be granted to the corporate defendant. With the growing acceptance of corporate

invisible, intangible essence of air which we term a corporation can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can also intend to do those acts, and can act therein as well viciously as virtuously. The ordinary crimes, wherein only general evil, or the mere purpose to do the forbidden thing, suffices for the intent, are plainly within this doctrine.

Id. at 220. The earliest state cases holding corporations criminally liable recognized the connection between tort law principles and the intent element for criminal liability. See *Commonwealth v. Proprietors of New Bedford Bridge*, 68 Mass. (2 Gray) 339, 346 (1854); *State v. Morris & Essex R.R.*, 23 N.J.L. 360, 367 (1852).

87. See Horwitz, *supra* note 27, at 179 ("There was a flood of writing on the subject of 'corporate personality' in Germany, France, England, and America near the turn of the century."). The most influential European scholars in this area were Otto Gierke and Frederick Maitland, who translated Gierke's works into English, and Ernst Freund was the leading American writer on the subject. See Mark, *supra* note 8, at 1465-66. For an extended review of the development of the real entity theory of the corporation, see Mark, *supra* note 8, at 1464-78; Hager, *supra* note 52; Horwitz, *supra* note 27.

88. See HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW 1836-1937*, at 283 (1991) (discussing shift in late nineteenth century away from classical economic theory under which Sherman Anti-Trust Act "federalize[d] the perceived common law, [and] it also changed the status of contracts, combinations, and conspiracies in restraint of trade from merely unenforceable to affirmatively illegal").

criminal liability, corporations shifted their defense to raising constitutional challenges to Congress's power to regulate the economy and to asserting the rights of individual defendants against the government.

In an earlier era, when business organizations were primarily concerned with protecting their private economic rights through federal judicial power, the constitutional issues turned on whether a corporation was a "Citizen" or could seek protection from governmental interference in its organization and business dealings. The development of corporate criminal liability shifted the focus to a new area that involved different concerns about the balance between the government's power to regulate businesses and the specter of prosecutorial overreaching that interfered with the right to operate free from oppression. Indeed, the questions raised by challenges to government's power to investigate and prosecute corporations continue to confront courts to this day.

A. *The Power to Regulate Business*

The increased regulation of large business organizations by the federal government led to a number of high-profile civil and criminal actions against well-known corporations and concomitant challenges to the government's power to reach economic activity.⁸⁹ In *Northern Securities Co. v. United States*,⁹⁰ a closely-watched antitrust case, a holding company that dominated interstate railroad transportation challenged the application of the Sherman Act to a business that had been properly incorporated and authorized by the state of incorporation to engage in any type of business.⁹¹ The company argued that under the Tenth Amendment,⁹² any federal regulation invaded the state's power to charter corporations and therefore fell beyond the area of permissible congressional regulation.⁹³

89. See *Interstate Commerce Comm'n v. Brimson*, 154 U.S. 447, 486 (1894) (holding that the ICC did not have the power to compel witnesses to testify); *United States v. E. C. Knight & Co.*, 156 U.S. 1, 9, 16 (1895) (adopting a narrow interpretation of "combinations in restraint of trade" under the Sherman Act); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 312-13 (1897) (upholding antitrust prosecution of railroads); *Interstate Commerce Comm'n v. Alabama Midland R.R.*, 168 U.S. 144, 175 (1897) (permitting judicial review of ICC findings of fact); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 246-47 (1899) (upholding antitrust conviction for market-allocation plan).

90. 193 U.S. 197 (1904).

91. *Id.* at 342.

92. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). Essentially, the corporation argued that it came within the term "people" to whom powers were reserved under the Constitution. *Northern Secs.*, 193 U.S. at 342.

93. *Id.* at 344-45. *Northern Securities Company* was incorporated in New Jersey, which had at that time the nation's most liberal incorporation law. *Id.*

The Court's opinion was a caustic rejection of the challenge to the federal government's power to control interstate commerce:

[T]he court has steadily held to the doctrine, vital to the United States as well as to the States, that a state enactment, even if passed in the exercise of its acknowledged powers, must yield, in case of conflict, to the supremacy of the Constitution of the United States and the acts of Congress enacted in pursuance of its provisions.⁹⁴

In *Armour Packing Co. v. United States*,⁹⁵ corporations argued that their prosecutions under the Elkins Act for receiving unlawful concessions from railroad shippers violated the constitutional venue provisions for criminal actions.⁹⁶ The Elkins Act permitted the government to prosecute a shipper in the district where the crime was committed "or through which the transportation may have been conducted."⁹⁷ The companies argued that this authorization for prosecutions in a district other than where the crime took place was impermissible because Congress sought to extend federal power beyond the parameters of the constitutional venue limitation.⁹⁸ The Supreme Court rejected this argument and upheld the broad venue provision because an Elkins Act violation was a continuing offense committed in each district in which an item was shipped.⁹⁹

Although the Court rejected the arguments advanced by the corporations in *Northern Securities* and *Armour Packing*, it never questioned a corporation's power to assert a claim that a statute violated its constitutional rights.¹⁰⁰ The constitutional arguments advanced in *Northern Securities* and *Armour Packing* involved challenges to Congress's power to criminalize a particular act or to enact a broad jurisdictional provision. Neither case

94. *Id.* at 347. In rejecting the corporation's argument, the Court stated, "We cannot conceive how it is possible for any one to seriously contend for such a proposition." *Id.* at 345.

95. 209 U.S. 56 (1908).

96. *Id.* at 73; see U.S. CONST. art III, § 2, cl. 3 ("The trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed."); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.").

97. *Id.* at 73 (quoting Elkins Act, ch. 708, 32 Stat. 847 (1903) (codified as amended at 49 U.S.C. § 11903(d) (1994))).

98. *Id.* at 76-77.

99. *Id.* at 77. The Court noted that "[t]o say that this construction may work serious hardship in permitting prosecutions in places distant from the home and remote from the vicinage of the accused is to state an objection to the policy of the law, not to the power of Congress to pass it." *Id.*

100. The Court's analysis of the substantive challenges to Congressional enactments was consistent with its Contracts Clause approach in *Trustee of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

involved the assertion by a corporation of a constitutional right that would prevent the government from pursuing a particular method of investigation or from using evidence to prosecute a crime.

Facial challenges to the validity of a statute, as opposed to a particular application, go to the very heart of whether the government has exerted its authority impermissibly to bring the defendant before the court. In that context, therefore, the status of the party subject to the statute, whether it was a corporation or individual, was irrelevant to the threshold issue of the congressional power under the Constitution to adopt the provision.

B. Hale v. Henkel: Ascertaining the Limits of Constitutional Protection for Corporations

With the growth of federal regulation of economic activity through criminal statutes in the late nineteenth century, the contours of the government's power to prosecute business organizations demanded the Court's attention.¹⁰¹ Prosecutions involving statutes that regulate economic relations and the conduct of business activities are usually the result of extended investigations that involve gathering a large number of documents to prove how the conduct of an ostensibly legal transaction constitutes a violation of the law.¹⁰² The best, and often only, source of information is the target of the investigation, who will have the records necessary to trace the questionable transactions. Without access to those documents, the government's ability to prosecute economic crimes would be severely impaired.¹⁰³

The development of the federal criminal law regarding corporations through the district court decision in *MacAndrews & Forbes Co.* is helpful to understanding the context in which the Supreme Court decided *Hale v. Henkel*. *Hale v. Henkel* grew out of the same investigation of price fixing in the tobacco industry that led to the Sherman Act conspiracy prosecution in *MacAndrews & Forbes Co.* In *Hale v. Henkel*, the Supreme Court considered Fourth and Fifth Amendment challenges by the custodian of

101. Cf. Lederman, *supra* note 61, at 288 ("The evolutionary process of the [*respondeat superior*] theory was not . . . altogether wild and accidental, nor did it lack internal legal reasoning and legal direction.").

102. See Peter J. Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will the Courts Allow Prosecutors to Go?*, 54 U. PITT. L. REV. 405, 408 (1993) [hereinafter Henning, *White Collar Crime*] (stating that corporate crime usually consists "of a number of events spread over an extended period of time, with the 'real' evidence frequently buried in reams of business and corporate records relating to numerous transactions").

103. See *Braswell v. United States*, 487 U.S. 99, 115 (1988) (permitting collective entities to assert Fifth Amendment privilege "would have a detrimental impact on the Government's efforts to prosecute 'white-collar crime,' one of the most serious problems confronting law enforcement authorities").

records for the MacAndrews & Forbes Company to a subpoena *duces tecum* calling for the corporation to produce a broad array of records in connection with a criminal antitrust investigation of the tobacco industry.¹⁰⁴ At the outset, the Court framed the problem:

If, whenever an officer or employe' [sic] of a corporation were summoned before a grand jury as a witness he could refuse to produce the books and documents of such corporation, upon the ground that they would incriminate the corporation itself, it would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers.¹⁰⁵

Although the Court was clearly reluctant to accept this failure, it had to confront the broad language in its earlier decision in *Boyd v. United States*¹⁰⁶ restricting the government's power to compel the production of incriminating documents. In *Boyd*, the Court held that the Fourth and Fifth Amendments prohibited "any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of [a] crime or to forfeit his goods."¹⁰⁷ *Boyd* involved an attempt by the government to obtain invoices for imported glass from a partnership to show that the importer had not paid the proper duties on the items.¹⁰⁸ The Court prohibited the government from obtaining the documents, based on reading the Fourth and Fifth Amendments together to forbid "the invasion of [the] indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by . . . conviction for some public offense."¹⁰⁹

Boyd seemed to grant every recipient of a demand for documents the constitutional right to forestall the government from compelling the person to produce incriminating papers, even if the documents related to ordinary business transactions.¹¹⁰ If the Fourth and Fifth Amendments together

104. 201 U.S. 43, 60 (1906).

105. *Id.* at 74.

106. 116 U.S. 616 (1886).

107. *Id.* at 630.

108. *Id.* at 618.

109. *Id.* at 630. *Boyd* has often been cited for its broad statement of the right to privacy. See *Olmstead v. United States*, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting) (stating that *Boyd* "will be remembered as long as civil liberty lives in the United States"). However, *Boyd* no longer remains good law for either its Fourth or Fifth Amendment holdings. See *Fisher v. United States*, 425 U.S. 391, 408 (1976) (the "precise claim sustained in *Boyd* would now be rejected").

110. *Boyd*, 116 U.S. at 633-34. In *United States v. National Lead Co.*, 75 F. 94 (C.C.D.N.J. 1896), decided after *Boyd*, a lower court refused to require a corporation to produce its records prior to trial in a civil suit brought by the government seeking to recover on an allegedly false claim by the company. *Id.* at 97. The statutory basis for the production sought was the same as that in *Boyd*, and the court rejected the government's request for

protected all documents held by private parties, then the prosecution of corporations for economic crimes would have to proceed without access to any of the company's documents, save those turned over voluntarily or provided by third parties.¹¹¹

The Supreme Court in *Hale v. Henkel* faced the question of how to balance *Boyd*'s broad protection for individuals from being compelled to produce incriminating documents with the developing trend that corporations could be held criminally liable for their acts. A holding that permitted corporations to invoke the full protection of the Fourth and Fifth Amendments would thwart the government's enforcement effort by making investigation of a corporation's crimes virtually impossible. On the other hand, simply refusing to extend the Fourth and Fifth Amendments to corporate defendants might be too extreme because the Court had frequently recognized that corporations were persons or citizens under other provisions of the Constitution.¹¹² Thus, the Court chose the Solomonic approach in *Hale v. Henkel*, denying protection under the Fifth Amendment while recognizing some measure of protection under the Fourth Amendment.¹¹³

Hale v. Henkel held that a corporation has no Fifth Amendment right to refuse to produce records pursuant to a subpoena because the privilege against self-incrimination "is purely a personal privilege of the witness" that cannot be exercised by the corporation.¹¹⁴ The Fifth Amendment only applied when the person may incriminate "himself"; the testimony sought by the government from MacAndrews & Forbes Company could only have been provided by the custodian of records testifying in a representative capacity. Therefore, the witness has no basis to claim the privilege on behalf of a third party.

Under this analysis, the corporation existed apart from its agents, and because the corporation itself did not testify, it could not exercise any claim of the privilege. This analysis permitted the Court to avoid deciding whether a corporation was a "person" protected by the Self-Incrimination Clause because the company itself was not asserting the Fifth Amendment

production of records before trial because "discovery will never be decreed when it might tend to convict the party of a crime or work a forfeiture of his property." *Id.* The circuit court cited to *Boyd* for support, and noted that the production of the records might incriminate both the individual officers and agents of the company and the corporation itself. *Id.* at 96.

111. Presumably, even under this broad reading of *Boyd*, the government could compel production of correspondence from the recipient, assuming that party was not under investigation for conspiring with the author of the correspondence.

112. See, e.g., *Pembina Consol.*, 125 U.S. at 189; *Santa Clara Co.*, 118 U.S. at 394; *Deveaux*, 9 U.S. (5 Cranch) at 88.

113. See *Hale v. Henkel*, 201 U.S. at 74-76.

114. *Hale v. Henkel*, 201 U.S. at 69-70.

protection: "The question whether a corporation is a 'person' within the meaning of this Amendment really does not arise."¹¹⁵

While the Court claimed it need not reach the question of whether a corporation can ever assert the privilege, the end result of the decision was that a corporation is *incapable* of ever insisting on the Fifth Amendment right because it could not speak except through its agents. These agents, however, were not equated with the corporation for Fifth Amendment purposes, so that while individuals retain their personal privilege not to incriminate themselves, they cannot assert the privilege on the corporation's behalf. As a consequence of this approach, the Court avoided considering the theoretical status of the corporation as a "real" versus "artificial" entity.¹¹⁶ An equally important effect of the Court's judgment was that the opinion circumvented the issue of whether the Fifth Amendment's other protections apply to corporate defendants.

In *Hale v. Henkel*, the Court was unwilling to allow the assertion of the Fifth Amendment to nullify congressional enactments regulating broad areas of the economy by the criminal authorities.¹¹⁷ At the same time, the Court did not intend to strip all constitutional protection away from corporations: "In organizing itself as a collective body it waives no constitutional immunities appropriate to such body."¹¹⁸ The key issue is what the Court meant by "appropriate" protection for corporations.

Although the Court found that a corporation had no right to refuse production of documents under the Self-Incrimination Clause, it provided corporations with some measure of protection by recognizing a Fourth Amendment right to be free from unreasonable searches and seizures.¹¹⁹ In the context of the subpoena *duces tecum* at issue, the Court found that it

115. *Id.*

116. Professor Horwitz argues that *Hale v. Henkel* is the first "natural entity" opinion, but then notes that "the Court's continuing reluctance to entirely personify the corporation is underlined by its decision in the same case refusing to extend fifth amendment protection against self-incrimination to corporations." Horwitz, *supra* note 27, at 182. *Hale v. Henkel* consciously avoided any particular theory of the corporation by adopting a functional analysis of the effect on the government's economic enforcement program if the constitutional protection were extended to corporations. Rather than endorsing a theory, the Court used the corporation's status as a vehicle to sanction a flexible approach to the application of constitutional rights.

117. *Hale v. Henkel*, 201 U.S. at 70 ("As the combination or conspiracies provided against by the Sherman antitrust act [sic] can ordinarily be proved only by the testimony of parties thereto, in the person of their agents or employees, the privilege claimed would practically nullify the whole act of Congress."); see William J. Stuntz, *Lawyers, Deception, and Evidence Gathering*, 79 VA. L. REV. 1903, 1941 (1993) (stating that "where the privilege does not apply, its application would impose a substantial evidentiary cost on the government and hence benefit guilty defendants and harm innocent ones").

118. *Hale v. Henkel*, 201 U.S. at 76.

119. *Id.*

would have "denuded" the MacAndrews & Forbes Company of vital records necessary to conduct its business.¹²⁰ This finding led to the holding that the subpoena was "far too sweeping in its terms to be regarded as reasonable."¹²¹

The Court's opinion failed to explain why corporations should be treated differently under the Fourth and Fifth Amendments. Justice Harlan, in a concurring opinion, argued that a corporation was not included within the terms "persons" or "people" under the Fourth Amendment, so he could not see any basis for treating the Fifth Amendment differently from the protection against unreasonable searches.¹²² The majority opinion in *Hale v. Henkel* ignored Justice Harlan's point and did not justify the disparate treatment under the Amendments, nor did it explain why a corporation could assert only a Fourth Amendment right that the Court in *Boyd* said was intimately related to the Fifth Amendment.¹²³

One possible reason for the Court's willingness to extend the Fourth Amendment protection to corporations was that the rationale for the prohibition on unreasonable searches described in *Boyd* is "for the security of person[s] and property."¹²⁴ Corporations can hold property and sue for deprivations without just compensation,¹²⁵ so constitutional protection of property rights extends beyond that held only by individuals. The weakness with this explanation of *Hale v. Henkel*'s Fourth Amendment analysis is that the government sought MacAndrews & Forbes Company records of business

120. *Id.* at 77.

121. *Id.* at 76. The Court analogized the subpoena to a search warrant and did not consider it meaningful that "many, if not all, of these documents may ultimately be required." *Id.* at 77. The Court stated: "A general subpoena of this description is equally indefensible as a search warrant would be if couched in similar terms." *Id.*

122. *Id.* at 78-79 (Harlan, J., concurring). Justice McKenna concurred on the same ground as Justice Harlan, asserting that "it would seem a strong, if not inevitable conclusion, [sic] that, if corporations have not such immunity, they can no more claim the protection of the Fourth Amendment than they can of the Fifth." *Id.* at 83 (McKenna, J., concurring). Justice Brewer dissented, arguing that the Fourth and Fifth Amendments should be interpreted consistently and the corporation should be granted rights under both provisions: "[I]f the word 'person' in [the Fourteenth] [A]mendment includes corporations, it also includes corporations when used in the 4th and 5th Amendments." *Id.* at 85 (Brewer, J., dissenting).

123. *Boyd*, 116 U.S. at 633 ("We have already noticed the intimate relation between the two Amendments. They throw great light on each other."); see Stephen A. Saltzburg, *The Required Records Doctrine: Its Lessons for the Privilege Against Self-Incrimination*, 53 U. CHI. L. REV. 6, 37 (1986) (the Court's reasoning for denying Fifth Amendment protection "could have been used to deny corporations fourth amendment protection, or the protection of almost any amendment, [so] the Court begged the question of why the privilege against self-incrimination should be denied to corporations that were not denied other rights.").

124. *Boyd*, 116 U.S. at 635 (emphasis added).

125. See *Hale v. Henkel*, 201 U.S. at 76 (stating that a corporation's "property cannot be taken without compensation").

transactions, and there was no physical invasion of the corporation's property, only the acts of the custodian of records complying with the subpoena.¹²⁶ The Court's concern was with the unreasonable scope of the subpoena, not corporate property rights.¹²⁷

In considering the Fourth and Fifth Amendment issues, *Hale v. Henkel* endeavored to reconcile two competing concerns. Corporate assertions of constitutional rights could negate the possibility of policing the actions of business organizations through the criminal mechanism. Therefore, *Hale v. Henkel* concluded that a corporation may be forced to give up evidence of its guilt because it was a "creature of the State" with "certain special privileges and franchises."¹²⁸ The corporation did not automatically qualify for protection under the Constitution solely because it was a defendant in a criminal action. In light of *Boyd's* condemnation of unfettered government power, however, the Court also recognized that there must be some limit on the government's prerogative to investigate and prosecute corporate criminal activity. In *Hale v. Henkel*, the Court bottomed that limit on the Fourth Amendment protection against an unreasonable search.

The Court's disparate application of the Fourth and Fifth Amendments to corporations did protect the rights of the individual, a significant concern expressed in *Boyd*.¹²⁹ *Hale v. Henkel's* Fifth Amendment analysis permitted a corporate agent called to testify pursuant to a subpoena to retain the personal right to assert the privilege against self-incrimination. Once the individual could assert a Fifth Amendment right to protect oneself from harm, the need to shield the corporation was lessened. Therefore, even though the corporation could not assert the privilege, there remained a means for safeguarding the fundamental rights of individuals. For Fourth Amendment purposes, however, only the corporation could assert the right because it alone would be the subject of the unreasonable search.¹³⁰

126. *MacAndrews & Forbes Co.*, 149 F. at 825.

127. If taken to its full measure in a corporate criminal prosecution, the Fourth Amendment could prove as disruptive to the government's enforcement program as the assertion of the Fifth Amendment, because requests for documents showing criminal activity in large-scale economic activities will by their very nature be "sweeping." Nevertheless, *Hale v. Henkel* was unwilling to simply jettison the Fourth Amendment, instead asserting that the Amendment provides some measure of protection to the corporation that is "appropriate." *Hale v. Henkel*, 201 U.S. at 88.

128. *Id.* at 74.

129. See generally *Boyd*, 116 U.S. at 630-31 (discussing the history of the amendments to the Constitution and their emphasis on individual liberty).

130. See William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1037 (1995) [hereinafter Stuntz, *Privacy's Problem*] ("This difference in treatment is perhaps an effort to protect individuals against privacy intrusions from the police without protecting institutions' interest in keeping regulation at bay.").

*C. The Expansive View of Corporate Criminal Liability
in New York Central*

Although *Hale v. Henkel* had involved a grand jury subpoena, the Court never paused to consider *whether* the MacAndrews & Forbes Company could be held liable for the criminal antitrust violation under investigation.¹³¹ The Court applied *Hale v. Henkel*'s agency analysis of the scope of the privilege against self-incrimination to reject a constitutional challenge to a corporation's criminal liability in *New York Central & Hudson River Railroad Co. v. United States*.¹³² In *New York Central*, the government indicted a railroad and two of its officers for granting unlawful discounts under the Elkins Act.¹³³ The corporation argued that its conviction violated the Due Process Clause because the court instructed the jury that acts of the agents were sufficient to prove the corporation's criminal liability without any separate proof of corporate intent.¹³⁴ Rejecting that argument, the Court explained that the agents acted within the scope of their authority in setting the illegal rates:

Applying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him to make rates for transportation, may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises.¹³⁵

In ascribing the intent of the agents to a corporate principal, made up of a number of different constituencies who were presumably innocent of the charged offense, the Court adopted a fiction that the intent of the

Another positive aspect of the approach in *Hale v. Henkel* is that the Court retained flexibility in determining the scope of protection while being attuned to the needs of individuals who act on behalf of the corporation. Rather than embracing a theory of the corporation that granted or withheld constitutional protection based on a vague determination of the status of a business organization *vis-a-vis* the individual, courts could evaluate the need to permit government enforcement while ensuring no misuse of authority. The primary concern was to enforce fully the criminal laws against business organizations, but not in a manner that could unreasonably allow the government to abuse its power to gather evidence and inflict punishment not only on the corporation, but on individuals connected to the organization as well.

131. See Mitchell L. Rothman, *Life After Doe? Self-Incrimination and Business Documents*, 56 U. CIN. L. REV. 387, 410 (1987) (stating that *New York Central* "extinguished any lingering doubt about corporate criminal liability").

132. 212 U.S. 481 (1909).

133. *Id.* at 489-91.

134. *Id.* at 492.

135. *Id.* at 494. The Court stated that there were some crimes for which a corporation could not be held liable, but did not enumerate which ones were beyond the corporation's power to commit. *Id.* 494-95.

collective entity was necessarily that of *each* of its constituents.¹³⁶ Instead, *New York Central* simply asserted that accepting the corporation's argument would "give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime [which] would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at."¹³⁷

136. Early criticisms of corporate criminal liability based on *respondeat superior* noted the incongruity of imputing the agent's intent to the corporate body. See Frederic P. Lee, *Corporate Criminal Liability*, 28 COLUM. L. REV. 1, 14 (1928) ("The greater part of the more recent cases have in consequence either held that criminal intent was not an element of the particular crime or else, with a verbal simplicity that hides the real difficulty, have 'imputed' to the mind of the entity a criminal intent."); George F. Canfield, *Corporate Responsibility for Crime*, 14 COLUM. L. REV. 469, 477 (1914) ("It is, therefore, not only not easy or logical to ascribe to a corporation an evil mind, but it is absolutely impossible to do so, except, of course, by a purely arbitrary and irrational fiction."). Reliance on fictive attributions for corporations was not, however, particularly novel for the Supreme Court, given its treatment of corporate citizenship for purposes of diversity jurisdiction. See *supra* note 34 (discussing theory propounded in *Marshall v. Baltimore & Ohio Railroad Co.* that corporate citizenship was based on citizenship of shareholders, all of whom were conclusively presumed to reside in the state of incorporation).

137. *New York Central*, 212 U.S. at 495-96. The Elkins Act in effect at the time of *New York Central* specifically mentioned corporations as subject to its restrictions. See Elkins Act, ch. 708, 32 Stat. 847 (1903). But the opinion did not consider whether the statutory language alone was sufficient to uphold the corporation's criminal liability.

The application of the *respondeat superior* theory to corporate criminal liability has been criticized as relying on "simplistic notions of agency," Laufer, *supra* note 21, at 649, and that it ignores the element of the intent of the corporation in assessing criminal liability. See Pamela H. Bucy, *Organizational Sentencing Guidelines: The Cart Before the Horse*, 71 WASH. U. L.Q. 329, 334 (1993); Bucy, *Corporate Ethos*, *supra* note 21, at 1103. One scholar has even called corporate criminal liability a "weed," contending that "the law has proceeded without rationale whatsoever." Gerhard O.W. Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21, 23 (1957). Professor Mueller proposed the term "*herba responsibilis corporationis M.*" for corporate criminal liability, asserting that "[n]obody bred it, nobody cultivated it, nobody planted it. It just grew." *Id.* at 21.

The argument that the criminal liability of corporations was an accidental or thoughtless development is erroneous. One basis for Professor Mueller's criticism of corporate criminal liability based on the *respondeat superior* theory was that it was confined to the United States. *Id.* at 28 ("Apart from a few temporary and partial exceptions the maxim that *societas delinquere non potest* is still firmly rooted in the civil law."). The more recent trend in Europe, however, has been to expand the liability of corporations for criminal offenses, with the Dutch adopting the American theory of liability. See Guy Stessens, *Corporate Criminal Liability: A Comparative Perspective*, 43 INT'L & COMP. L.Q. 493, 507 (1994); L.H. Leigh, *The Criminal Liability of Corporations and Other Groups: A Comparative View*, 80 MICH. L. REV. 1508, 1510 (1982). The argument that the criminal liability of corporations was an aberration ignores the development of the law in the federal courts culminating in the Supreme Court's decisions in *Hale v. Henkel* and *New York Central*.

If the Supreme Court had adopted a theory of liability requiring proof of a separate *mens rea* for the corporate defendant, then that would call into question the Fifth Amendment agency analysis of *Hale v. Henkel*. Proof of a distinct corporate intent would compel a court to recognize that the corporation was capable of expressing intentions that were not necessarily embodied through its agents. According a separate existence to the corporation for proof of every element of a crime could raise the organization to the level of a "person" under the Self-Incrimination Clause, thereby foiling the careful balancing the Court undertook in *Hale v. Henkel*. The *respondeat superior* theory was the only approach available in *New York Central* to preserve corporate criminal liability in the face of the due process challenge without completely foreclosing other constitutional protections to corporate defendants.

The railroad company's constitutional argument was strikingly similar to the MacAndrews & Forbes Company's assertion of a Fifth Amendment right, in the sense that acceptance of either claim would make enforcement of the criminal laws against corporate entities virtually impossible. *New York Central*'s attention to the functional consequences of its decision was consistent with the method adopted in *Hale v. Henkel* to determine the scope of a corporation's constitutional rights. Moreover, permitting prosecution of a corporation on the *respondeat superior* theory involved very little threat to the rights of individual corporate agents because any criminal action against them would necessarily entail providing the individual defendants with all of the constitutional rights guaranteed to non-corporate defendants. The capacity to assert the protection of the Constitution to curb any misuse of the government's power can be exercised fully by the individual defendant, which can also inure to the benefit of the corporation if they are indicted together, as they were in *New York Central*.

If the corporation alone is indicted, then there is no threat to individual agents because they will not be punished for the acts committed on behalf of the business organization. In that instance, the issue then becomes what criminal constitutional rights can a corporate defendant assert that do not undermine the government's law enforcement power to such an extent as to make assertion of the right unacceptable. The *respondeat superior* theory of corporate liability gives the government the power to prosecute corporations without expanding the scope of the criminal constitutional rights a corporation can exercise when it is prosecuted by the government.

D. Conclusion

Hale v. Henkel's Fifth Amendment analysis hinges on the role of the corporate agent—the person testifies on behalf of the organization as its only means of communicating, yet the agent cannot assert the privilege against self-incrimination if the testimony only incriminates a third party, the corporation. By focusing on the agent's capacity as the sole party whose rights were affected, the Court professed that it was not concerned with

whether the corporation was a "person" for Fifth Amendment purposes.¹³⁸ The Court then applied that agency analysis in *New York Central* to support its conclusion that due process permitted holding the corporation fully liable for the acts of each of its agents by attributing the agent's *mens rea* to the corporation. The Court premised its denial of constitutional protection to the corporate defendant by balancing the need to protect the government's ability to prosecute corporations for wrongdoing with the possibility that the government will misuse its power against the corporation and, indirectly, against the individual.¹³⁹ The degree of constitutional protection afforded to corporations depended on that weighing of interests, so the corporation's rights could not be coterminous with the rights of the individual criminal defendant.

The balance struck by the Court in *Hale v. Henkel* provides a guide for limiting a corporation's criminal constitutional rights to those protections that are "appropriate."¹⁴⁰ First, the applicability of a particular right depends on considering the need for adequate enforcement of the law against the possibility of governmental abuse of its power to gather evidence to convict and punish a defendant. In considering the Fifth Amendment, the Court concluded that the Self-Incrimination Clause could be used to undermine the government's enforcement effort against corporate defendants as the basis for denying the privilege to corporations.¹⁴¹ The Fourth Amendment, on the other hand, only prohibits "unreasonable" searches,

138. In *Wilson v. United States*, 221 U.S. 361 (1911), the Supreme Court took the agency theory one step further in holding that a corporate agent could not assert the privilege to resist production of business records even if the custodian of the records created the documents and they were personally incriminating. *Id.* at 384-85. Wilson was president and director of a corporation, and the government indicted him for mail fraud and conspiracy in connection with transactions by the corporation. *Id.* at 367-68. Wilson took the corporate account books, which he had created and maintained, and refused to produce them despite being directed to do so by the company's board of directors. *Id.* at 371. The Court stated, "If the corporation were guilty of misconduct, [Wilson] could not withhold its books to save it; and if he were implicated in the violations of law, he could not withhold the books to protect himself from the effect of their disclosures." *Id.* at 384. The corporate agent's function as the embodiment of the organization meant that the acts on behalf of the corporation were not personal, but only those of the corporation. The agent could not use a personal privilege to prevent a corporation from fulfilling the requirement of the law. *Wilson's* holding that the records of a corporation were not private papers subject to the protection of the Fourth and Fifth Amendments further undermined *Boyd's* analysis limiting the government's power to investigate corporate wrongdoing through the review of business records. *Id.* at 380.

139. See *Hale v. Henkel*, 201 U.S. at 74-75.

140. See Saltzburg, *supra* note 123, at 37 ("In the end, the Court in *Hale* struck a sensible compromise in its treatment of corporations.").

141. *Hale v. Henkel*, 201 U.S. at 75.

giving courts a flexible means to police government conduct without effectively supplying corporations a complete shield from criminal liability.

IV. MAKING SENSE OUT OF CORPORATE RIGHTS UNDER THE SELF-INCRIMINATION CLAUSE AND THE FOURTH AMENDMENT

The balancing act in *Hale v. Henkel* was a significant step in establishing the scope of corporate constitutional rights in a criminal prosecution by recognizing that the comparison of interests of the government and the defendant could lead to different results from cases involving the rights of individuals. Since that decision, the Court has consistently denied the privilege against self-incrimination to corporations and has expanded the prohibition to cover a broader array of business organizations, such as partnerships and unions. The weighing of interests in *Hale v. Henkel* produced a clear result, albeit one that granted no Fifth Amendment privilege to the corporation.

The development of the rights of business entities under the Fourth Amendment has been more haphazard because *Hale v. Henkel* did not set forth a clear analytical model of the "appropriate" protection for a corporation.¹⁴² Yet, the decisions construing the extent of a corporation's right to be free from unreasonable searches exhibit a measure of adherence to the form of analysis adopted in *Hale v. Henkel*. The Court's efforts to define the constitutional limits of searches of business property yield a much more constricted corporate right than individuals enjoy. That should not be surprising and is, in fact, consistent with the approach adopted in *Hale v. Henkel* for defining corporate constitutional rights in the criminal context.

A. The Expanding Definition of a Collective Entity

After *Hale v. Henkel*, the scope of the privilege against self-incrimination appeared clear with regard to state-chartered entities—the government could require them to produce records so long as the subpoena was not overbroad. Even if the corporation had dissolved, that did not change the character of the documents or generate a Fifth Amendment right for a corporate agent to refuse their production.¹⁴³ Incorporation is not, however, the only choice for organizing a business, and criminal activity is not confined to entities operating under a state-granted charter.

142. Professor Stuntz concludes that "the law has followed the path *Hale* marked out: abandon privacy where it might create difficulties outside ordinary criminal procedure. The result is a body of Fourth and Fifth Amendment law filled with strange twists and turns." Stuntz, *Privacy's Problem*, *supra* note 130, at 1055.

143. See *Wheeler v. United States*, 226 U.S. 478, 490 (1913).

In *United States v. White*,¹⁴⁴ the Supreme Court upheld a subpoena to a union for its records related to possible kickbacks on public works projects over an assertion of the privilege against self-incrimination by the union's custodian of records.¹⁴⁵ The Court stated that "the power to compel the production of the records of *any organization*, whether it be incorporated or not, arises out of the inherent and necessary power of the federal and state governments to enforce their laws."¹⁴⁶ The Court found, once again, that the Fifth Amendment's protection only extended to "natural individuals acting in their own private capacity,"¹⁴⁷ not to an organization.

At the same time, *White* expressed concerns that the government not seek to bypass the privilege simply because an individual acted as part of an organization, and it remained wary of permitting the government to use its power to harass the individual.¹⁴⁸ Therefore, the Court enunciated the test to determine what constitutes an organization:

[W]hether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only.¹⁴⁹

If an organization meets this description, then the custodian of its records cannot refuse to turn over organizational documents on the basis of an assertion of the Fifth Amendment, regardless of whether the records are personally incriminating.¹⁵⁰

144. 322 U.S. 694 (1944).

145. *Id.* at 705.

146. *Id.* at 700-01 (emphasis added). Earlier decisions had made reference to the government's visitatorial power over a corporation that received its charter from the state as a basis for denying the corporation the right to refuse to produce its records. *White* moved away from that basis because the union was not necessarily subject to the government's power because the organization was not chartered under a grant of authority by the state.

147. *Id.* at 700.

148. See Henning, *White Collar Crime*, *supra* note 102, at 418 (stating that "*White* exemplifies the Court's hesitancy in making its rule too broad").

149. *White*, 322 U.S. at 701.

150. The Court further refined the definition of organizations barred from asserting the privilege against self-incrimination in *Bellis v. United States*, 417 U.S. 85 (1974), which involved a subpoena to a three-person law firm. In upholding the subpoena, the Court declared that groups cannot assert the privilege if they are "relatively well organized and structured, and not merely a loose, informal association of individuals. It must maintain a distinct set of organizational records, and recognize rights in its members of control and access to them." *Id.* at 92-93. The *Bellis* test is highly malleable, and places few limits on a court's authority to hold that an organization, no matter how small, cannot invoke the protection of the Fifth Amendment to refuse to produce records.

Most recently, the Court reaffirmed the strict Fifth Amendment analysis of corporate rights in *Braswell v. United States*.¹⁵¹ *Braswell* involved a subpoena for the records of a closely-held corporation dominated by its principal shareholder.¹⁵² The government's apparent reason for issuing a subpoena to the corporation was to use the documents against the principal shareholder in an individual prosecution.¹⁵³ The Court began its analysis by elucidating the "lengthy and distinguished pedigree" of the collective entity rule.¹⁵⁴ It then proceeded to hold that the principal shareholder's "act of production is not deemed a personal act, but rather an act of the corporation" and therefore not within the protection of the privilege against self-incrimination.¹⁵⁵

The Court's rationale for adopting increasingly broad definitions of the types of entities that may not invoke the privilege against self-incrimination could be found in its expressed fear of undermining the government's law enforcement effort if it construed the corporation's constitutional rights too expansively. *Hale v. Henkel* recognized that granting a corporation the privilege would "close the door of access to every available source of information on the subject" of the criminal acts.¹⁵⁶ In *White*, the Court reiterated that rationale: "Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible."¹⁵⁷ Finally, *Braswell* took up the charge against extending any Fifth Amendment protection to a corporation when the Court explained that granting the privilege to collective entities "would have a detrimental effect on the Government's

In *Fisher v. United States*, 425 U.S. 391 (1976), the Court shifted the focus of the analysis of the privilege against self-incrimination away from analyzing the structure of the organization and toward whether the act-of-production was testimonial. *Id.* at 408. In *United States v. Doe*, 465 U.S. 605 (1984), the Court held that the custodian of records of a sole proprietorship could assert the privilege because his act-of-production was personally incriminating. *Id.* at 608; see Henning, *White Collar Crime*, *supra* note 102, at 419-22 (reviewing *Fisher* and *Doe*).

151. 487 U.S. 99 (1988).

152. *Id.* at 100-01.

153. *Id.* at 101. The corporation's board of directors consisted of Braswell, his wife, and his mother; and he acknowledged that he was responsible for the business operation. *Id.*

154. *Id.* at 104.

155. *Id.* at 110. The Court rejected the argument that *Fisher* and *Doe* altered the analysis of the scope of the Fifth Amendment, stating, "[T]he lesson of *Fisher* is clear: A custodian may not resist a subpoena for corporate records on Fifth Amendment grounds." *Id.* at 113.

156. *Hale v. Henkel*, 201 U.S. 43, 70 (1906).

157. *White*, 322 U.S. at 700 (citing *Hale v. Henkel*, 201 U.S. 43, 70, 74 (1906)). The Court stated that the framers of the Constitution "cannot be said to have intended the privilege to be available to protect economic or other interests of such organizations so as to nullify appropriate governmental regulation." *Id.* This statement is interesting because the framers never considered corporations in drafting the Constitution. The various protections afforded to individuals can equally frustrate government law enforcement, yet one would never use that as the basis for denying all constitutional protection.

efforts to prosecute 'white-collar crime,' one of the most serious problems confronting law enforcement authorities."¹⁵⁸

Yet, *Braswell* also was attuned to the tension first identified in the constitutional analysis of *Hale v. Henkel*, when the Court was unwilling to grant the government unfettered power to investigate and prosecute crimes by negating a corporation's Fourth Amendment rights because such unlimited authority could seriously infringe on the liberty of individuals. Thus, *Braswell* prohibited the government from making any evidentiary use of the individual custodian's act on behalf of the corporation against that person in a later prosecution—"For example, in a criminal prosecution against the custodian, the Government may not introduce into evidence before the jury the fact that the subpoena was served upon and the corporation's documents were delivered by one particular individual, the custodian."¹⁵⁹

The Court has taken comfort in its stated conclusion that denying the Fifth Amendment privilege against self-incrimination to corporations would not seriously impair the rights of the individual, especially when compared with the perceived effect that affording the privilege to corporations would have on the government's ability to prosecute white collar crime. *Braswell* recognized that an individual producing business records incurs some risk when acting as the custodian for the collective entity, which could be a reason to permit the custodian to invoke the privilege. Rather than risk undermining the law enforcement power by expanding the scope of the Fifth Amendment right, *Braswell* created a quasi-constitutional immunity that prohibits the government from making any direct evidentiary use of the act of production in prosecution of the custodian individually.¹⁶⁰ By providing explicit protection to the individual, the Court negated some of the effect of denying the privilege to corporations without having to reconsider the balance it struck in *Hale v. Henkel* in barring a corporation from refusing to produce documents.

B. The Government's Power to Investigate Corporations Under the Fourth Amendment

1. Outrageous Searches and the Overbroad Subpoena

Hale v. Henkel asserted that a corporation retains its right under the Fourth Amendment to be free from unreasonable searches and seizures, but the protection of a corporation's rights is not co-extensive with the security afforded the individual. After *Hale v. Henkel*, the Court was not solicitous of questionable government law enforcement investigations that were clearly an affront to the

158. *Braswell*, 487 U.S. at 115 (footnote omitted).

159. *Id.* at 118. The Court did not explain the constitutional basis for this restriction on the government. See Henning, *White Collar Crime*, *supra* note 102, at 424.

160. See Henning, *White Collar Crime*, *supra* note 102, at 424 (*Braswell* failed "to explain either the constitutional basis for the evidentiary prohibition or what use the government could make of the act of production.").

rights of business owners. The Court's initial pronouncements on the Fourth Amendment rights of corporations came in cases that involved a "fishing expedition" with the broad net of the subpoena *duces tecum*, and questionable government searches that called into question the fairness of the investigation itself.

The first of these cases was *Silverthorne Lumber Co. v. United States*,¹⁶¹ in which the government engaged in an unauthorized search of a corporation's offices.¹⁶² After a federal district court ordered the return of the seized records, the government issued a subpoena for the same documents.¹⁶³ The Supreme Court flatly rejected the government's argument that the subpoena was lawful, stating that "the rights of a corporation against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way."¹⁶⁴

Shortly thereafter, in *Federal Trade Commission v. American Tobacco Co.*,¹⁶⁵ the Supreme Court refused to enforce broad subpoenas that called for the production of all correspondence sent and received by a group of companies over the course of an entire year.¹⁶⁶ The Court termed the requests, which were issued as part of a congressionally-inspired antitrust investigation, "fishing expeditions into private papers on the possibility that they may disclose evidence of crime" without any indication of the documents' relevance.¹⁶⁷ The troubling issue for the Court was the government's failure to identify any wrongdoing by the holders of the documents, leading it to find: "It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up."¹⁶⁸

The third corporate Fourth Amendment case to reach the Court in this period involved a flagrant violation of the basic concept of honesty in law enforcement. In *Go-Bart Importing Co. v. United States*,¹⁶⁹ a government agent arrested two people and seized corporate documents by claiming falsely that he had a warrant.¹⁷⁰ The company sought the exclusion of the records under the Fourth and Fifth Amendments,¹⁷¹ although it did not

161. 251 U.S. 385 (1920).

162. *Id.* at 390.

163. *Id.* at 391.

164. *Id.* at 392. Justice Holmes, author of the majority opinion, attacked the perceived duplicity of the prosecutors by stating that: "The Government now, while in form repudiating and condemning the illegal seizure, seeks to maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had." *Id.* at 391.

165. 264 U.S. 298 (1924).

166. *Id.* at 304-05.

167. *Id.* at 306.

168. *Id.*

169. 282 U.S. 344 (1931).

170. *Id.* at 346.

171. *Id.*

explain how it could assert a right under the Fifth Amendment. The Court excluded the evidence and denigrated the government's actions as "a lawless invasion of the premises and a general exploratory search in the hope that evidence of crime might be found."¹⁷² Beyond its scathing review of the government's misconduct the Court did not explain the constitutional basis for its decision.

These early cases involving a corporation's assertion of its Fourth Amendment right were easy to decide because the government malfeasance was so blatant. If the violations had not been real, it would have been almost comical. The overly broad document request in *American Tobacco* is as questionable as the unauthorized searches in *Silverthorne Lumber* and *Go-Bart Importing* because in each case the government overstepped the bounds of fairness in the investigation, causing the Court to apply the Fourth Amendment as a shield to prevent the misuse of the investigatory power. The corporate nature of the victims of governmental impropriety appeared to be immaterial to the Court's decisions, and indeed the Court never alluded to the complainant's status in excluding the evidence or rejecting the subpoena. None of the opinions, therefore, provided any concrete guidance to determine what was unreasonable when a corporation was the target of a search.

2. Subpoenas in a New Regulatory Environment

As the scope of government regulation of business expanded after the New Deal and World War II, so too did the demands for information from business organizations used to monitor their compliance with legislative and administrative regulations. In *Oklahoma Press Publishing Co. v. Walling*,¹⁷³ the Supreme Court enforced a broad subpoena *duces tecum* requiring the production of records from newspaper publishers to determine whether they were obeying the Fair Labor Standards Act.¹⁷⁴ The Court noted that the subpoenas were designed "to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if . . . the facts thus discovered should justify doing so."¹⁷⁵ Unlike its earlier aversion to "fishing expeditions" in *American Tobacco*, the Court declared that when an order for production of documents was judicially authorized, the only issue was the reasonableness of the subpoena.¹⁷⁶

172. *Id.* at 358. The agents were searching for evidence of the illegal manufacture and distribution of liquor under the National Prohibition Act. *Id.* at 349.

173. 327 U.S. 186 (1946).

174. *Id.* at 189.

175. *Id.* at 201.

176. *Id.* at 209 ("Beyond this requirement of reasonableness, including particularity in 'describing the place to be searched, and the persons or things to be seized,' also literally applicable to warrants, comes down to specification of the documents to be produced

In considering a corporation's rights under the Fourth Amendment, *Oklahoma Press* stated that "corporations are not entitled to all of the constitutional protection which private individuals have in these and related matters."¹⁷⁷ The Court rejected the inference that could be drawn from its earlier decisions in *Silverthorne Lumber* and *American Tobacco* that apparently recognized a broad protection for corporations under the Fourth Amendment. Instead, the opinion explained that:

[such] suggestions or implications may be explained as dicta; or by virtue of the presence of an actual illegal search and seizure, the effects of which the Government sought later to overcome by applying the more liberal doctrine developed in relation to 'constructive search'; or by the scope of the subpoena in calling for documents so broadly or indefinitely that it was thought to approach in this respect the character of a general warrant or writ of assistance, odious in both English and American history.¹⁷⁸

Oklahoma Press was the first case to recognize explicitly that the Fourth Amendment's protection is not as extensive for corporations as for individuals, and that the test of reasonableness involves weighing the effect of granting protection on the efficacy of the government's investigatory powers. That approach comported with the "basic compromise [that] has been worked out in a manner to secure the public interest and at the same time to guard the private ones affected against the only abuses from which protection rightfully may be claimed."¹⁷⁹ Moreover, the Court justified this "basic compromise" on the same ground asserted in *Hale v. Henkel* that denied corporations the right to assert the privilege against self-incrimination—a broad construction of corporate Fourth Amendment rights "would stop much if not all of investigation in the public interest at the threshold of inquiry."¹⁸⁰

In *United States v. Morton Salt Co.*, the Supreme Court reiterated its position that corporate rights are not coextensive with individual rights under the Fourth Amendment.¹⁸¹ Rejecting a corporation's argument that a governmental demand for information concerning compliance with a consent decree violated the Fourth Amendment, the Court stated that "corporations can claim no equality with individuals in the enjoyment of a

adequate, but not excessive, for the purposes of the relevant inquiry.").

177. *Id.* at 205.

178. *Id.* at 206-07 (footnotes omitted). The Court distinguished *American Tobacco* as involving the "aggravating circumstance" of the government's claim of an unlimited right of access to the business records, *id.* at 207 n.40, although it was not clear how the broad subpoenas in *Oklahoma Press* differed from the document demand in *American Tobacco* in any meaningful way.

179. *Id.* at 213.

180. *Id.*

181. 338 U.S. 632 (1950).

right to privacy.”¹⁸² So long as the investigation was within the power of the government, then the only limits the Fourth Amendment imposed were that the documents be described with sufficient particularity in the demand and the information sought be reasonably relevant to the inquiry.¹⁸³

Insofar as earlier cases may be read to impose any significant limits on the government’s investigatory power *vis-a-vis* corporations, *Oklahoma Press* and *Morton Salt* laid to rest the argument under the Fourth Amendment that a corporation could resist a demand to produce its business records. The question the Court did not confront until much later was whether the Fourth Amendment imposed any constraint on the government’s power to search the premises of a business without first securing a warrant.

3. Regulatory Regimes as the Premise for the Right to Search Business Property

In *See v. City of Seattle*,¹⁸⁴ the Supreme Court held that the Fourth Amendment warrant requirement applied to government searches of business property.¹⁸⁵ The Court explained that a “businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property.”¹⁸⁶ Shortly thereafter, in *Katz v. United States*,¹⁸⁷ the Supreme Court reoriented the constitutional analysis of searches when it stated that “the Fourth Amendment protects people, not places.”¹⁸⁸ The Fourth Amendment was concerned with protecting privacy, not simply property interests, and a reasonable expectation of privacy extends to persons “in a business office, in a friend’s apartment, or in a taxicab.”¹⁸⁹ Although *See v. City of Seattle* apparently equated the “businessman” with the organization for the purpose of determining the validity of the government’s search, it was unclear, as an initial matter, whether *Katz*’s focus on the privacy right of “people, not places” would prohibit a corporation from invoking the Fourth Amendment to challenge a search conducted on its property.

182. *Id.* at 652.

183. *Id.*

184. 387 U.S. 541 (1967).

185. *Id.* at 545.

186. *Id.* at 543. The search in *See v. City of Seattle* involved a business owner who was convicted for refusing to permit a search of a locked commercial warehouse by the fire department as part of a routine canvass of businesses to determine their compliance with the fire code. *Id.* at 541. The Court held that the inspections could only take place after a warrant had been obtained. *Id.*

187. 389 U.S. 347 (1967).

188. *Id.* at 351.

189. *Id.* at 352 (footnotes omitted).

a. Development of the Administrative Search Exception

The seemingly unremarkable proposition advanced in *See v. City of Seattle*, that the government cannot enter onto a corporation's property to conduct a search without a warrant, was quickly undermined in a series of cases establishing an exception to the Warrant Clause for administrative searches. The initial step away from *Katz*'s seemingly broad protection involved businesses operating in closely regulated industries, such as retail liquor sales and gun dealers.

In *Colonnade Catering Corp. v. United States*,¹⁹⁰ the Court announced that a governmental inspection of a locked liquor storeroom without a warrant was permissible because "the liquor industry [has] long [been] subject to close supervision and inspection. As respects that industry . . . Congress has broad authority to fashion standards of reasonableness for searches and seizures."¹⁹¹ In *United States v. Biswell*,¹⁹² the Court upheld the inspection of a pawn shop owner's locked gun storeroom on the grounds that the dealer had no reasonable expectation of privacy because when one "chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection."¹⁹³ The Court noted that while regulation of firearms is not as deeply rooted in history as that of liquor, the supervision of which dates back to colonial times, mere temporal longevity alone did not determine whether the pervasiveness of regulation was sufficient to permit warrantless searches.¹⁹⁴ The Court considered the degree of regulation together with the need to permit unannounced inspections, when violations could be easily hidden or quickly corrected absent an unannounced search, as the critical factors for determining whether the government must first seek a warrant.¹⁹⁵

190. 397 U.S. 72 (1970).

191. *Id.* at 77. In *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974), the Court held that currency reporting regulations imposed on banks to provide information about customer transactions were "sufficiently described and limited in nature, and sufficiently related to a tenable congressional determination as to improper use of transactions of that type in interstate commerce, so as to withstand the Fourth amendment challenge made by the bank plaintiffs." *Id.* at 67. The Court relied on *Oklahoma Press* and *Morton Salt* in upholding the currency reporting requirements. *Id.*

192. 406 U.S. 311 (1972).

193. *Id.* at 316. The right to enter a closely regulated business without a warrant was not unconditional because the inspection system must be "carefully limited in time, place and scope" so that the constitutionality of the search is not based on the owner's consent but on the validity of the statute. *Id.* at 315.

194. *Id.*

195. *Id.* at 316. *Biswell*'s reference to some form of implied consent to enter a highly regulated business without a warrant has been roundly criticized as fictitious, especially when

Although the Court was unmoved in *Biswell* by the pawn shop owner's claim for Fourth Amendment protection, in *Marshall v. Barlow's, Inc.*,¹⁹⁶ it found that businesses had some expectation of privacy that prohibited warrantless searches related to workplace safety.¹⁹⁷ The Court rejected the argument that a business voluntarily consents to inspections under the Occupational Safety and Health Act (OSHA) because it chose to engage in a business that affects interstate commerce, noting that this was "the most fictional sense of voluntary consent."¹⁹⁸ In fact, due to the breadth of OSHA's regulatory scheme, such a finding would subject virtually every operation to warrantless inspections for health and safety violations. Therefore, the Court held that the government must secure a warrant before it could conduct a search pursuant to OSHA.¹⁹⁹

But the Court was unwilling to apply the same standard for obtaining a warrant to enter a business's premises as apply to government efforts to search a private individual's home. Instead, the Court in *Barlow's* held that a warrant could issue on a showing that the search will be conducted in accord with reasonable legislative or administrative standards.²⁰⁰ The Court relaxed the burden on the government to provide the particularized information required to demonstrate probable cause when a corporate entity is the target of the search.²⁰¹

one could join an industry that later becomes sufficiently regulated to allow a court to uphold warrantless administrative searches. See CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE § 13.03(b) (3d ed. 1993) (stating that "[C]ontrary to the Court's insinuation in *Biswell*, one does not 'consent' to surprise searches merely because one enters a 'closely regulated industry'"); WAYNE R. LAFAVE, SEARCH AND SEIZURE § 10.02(b) (2d ed. 1987) ("Hopefully, the *Biswell* case will mark the end of resort to artificial concepts of voluntariness as a means of avoiding more fundamental questions about the legality of various inspection schemes."). The Court rejected the warrantless seizure of property to satisfy a tax lien in *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977), stating that the government could not "effect a warrantless seizure of property, even that owned by a corporation, situated on private premises to which access is not otherwise available for the seizing officer." *Id.* at 354. The Court acknowledged, however, that "a business, by its special nature and voluntary existence, may open itself to intrusions that would not be permissible in a purely private context." *Id.* at 353.

196. 436 U.S. 307 (1978).

197. *Id.* at 315.

198. *Id.* at 314.

199. *Id.* at 325.

200. *Id.* at 320.

201. The Court first limited the probable cause requirement in *Camara v. Municipal Court*, 387 U.S. 523 (1967), when it held that housing inspections could be based on warrants that were issued pursuant to a neutral plan of investigation that did not target a particular business. *Id.* at 536. The Court stated that "[I]f a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." *Id.* at 539. This relaxation of the probable cause requirement has been strongly criticized as permitting general warrants, which were the very type of governmental action that led to the

In *Donovan v. Dewey*,²⁰² the Court took a somewhat different approach to justifying warrantless administrative inspections, stating that "it is the pervasiveness and regularity of the federal regulation that ultimately determines whether a warrant is necessary to render an inspection program reasonable under the Fourth Amendment."²⁰³ The Court abandoned the notion of voluntary consent first enunciated in *Biswell*, instead relying on congressional determinations of the necessity for the inspection based on reasonable standards incorporated into the program to ensure compliance with the Fourth Amendment.²⁰⁴ This approach comports with the Court's conclusion "that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home."²⁰⁵

b. *Dow Chemical* and *Burger*: Businesses Just Aren't People

The Supreme Court's acknowledgement in *Dewey* of the lesser protection under the Fourth Amendment for corporations and other businesses comported with the approach to corporate rights in *Hale v. Henkel*. The key question for warrantless inspections of commercial property is whether a line of business is of a type that the Court can label as a pervasively regulated industry. If so, then the need to preserve the government's enforcement effort justifies the warrantless entry. The degree of protection the Court afforded to business premises after *Barlow's* and *Dewey* appeared to be that the government could not invade commercial property to any greater degree than it could search an individual's property, absent the presence of a fairly narrow statutory scheme authorizing warrantless inspections. Yet, even that reduced measure of protection did not survive for long in the wake of the Court's more recent decisions in *Dow Chemical Co. v. United States*²⁰⁶ and *New York v. Burger*.²⁰⁷

In *Dow Chemical*, the Court rejected a corporation's Fourth Amendment challenge to the EPA's use of aerial surveillance photographs to monitor

adoption of the Fourth Amendment. See, e.g., Silas J. Wasserstrom & Louis M. Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 26 (1988) (administrative search exception is a "stunning reversal" of the theory of the Fourth Amendment that permits general warrants that "demonstrate the *absence* of particularity and probable cause").

202. 452 U.S. 594 (1981).

203. *Id.* at 606.

204. *Id.*

205. *Id.* at 598-99. The Court upheld warrantless searches under the Federal Mine Safety and Health Act, based on the substantial federal interest in regulating the mining industry and stating that the mining industry "is among the most hazardous in the country and that the poor health and safety record of this industry has significant deleterious effects on interstate commerce." *Id.* at 602.

206. 476 U.S. 227 (1986).

207. 482 U.S. 691 (1987).

compliance with emission standards at a chemical manufacturing plant.²⁰⁸ It found that the industrial complex "is more comparable to an open field and as such it is open to the view and observation of persons in aircraft lawfully in public airspace"²⁰⁹ The property did not qualify for the same Fourth Amendment protection as the curtilage area immediately surrounding an individual's house, an area in which the occupant usually maintains a legitimate expectation of privacy if the allegedly illegal activity was not conducted in the plain view of outsiders.²¹⁰ Despite Dow Chemical's extensive efforts to shield its facility from outsiders, the Court permitted government surveillance by adopting a narrower definition for corporations of the space within which a business has a privacy interest than that accorded to an individual's residence.²¹¹

In *Burger*, the Court upheld a warrantless inspection by police officers of an automobile junkyard's books and records because the operation fell within the category of pervasively regulated businesses.²¹² The Court explained that a statutory scheme permitting warrantless inspections of commercial property must meet three criteria: (1) there is a substantial governmental interest; (2) warrantless entry is necessary to avoid alerting owners who will hide violations; and (3) the inspection program is

208. *Dow Chemical*, 476 U.S. at 239.

209. *Id.*; see *Oliver v. United States*, 466 U.S. 170 (1984) (establishing open fields exception to the warrant requirement).

210. *Dow Chemical Co.*, 476 U.S. at 235; see *California v. Ciraolo*, 476 U.S. 207 (1986); *Oliver*, 466 U.S. at 179. The Court stated in *Dow Chemical* that "[t]he area at issue here can perhaps be seen as falling somewhere between 'open fields' and curtilage, but lacking some of the critical characteristics of both." *Dow Chemical Co.*, 476 U.S. at 236. The majority opinion justified that position because the areas for which the company sought protection as curtilage "cover the equivalent of a half dozen family farms." *Id.* at 236 n.3. Although, the Court did not explain why an industrial facility's size should remove it from the protection of the Constitution.

211. In *United States v. Hall*, 47 F.3d 1091 (11th Cir. 1995), the Eleventh Circuit stated:

The fact that the test of the legitimacy of an expectation of privacy is the same in both the residential and commercial sphere does not mean, however, that the facts which tend to be of probative value in resolving the [business curtilage] inquiry when the governmental intrusion involves a residence, are to be accorded the same weight when the inquiry is directed at the legitimacy of a privacy expectation in commercial property. The Supreme Court's treatment of the expectation of privacy that the owner of commercial property enjoys in such property has differed significantly from the protection accorded an individual's home.

Id. at 1095. See *Lesser v. Espy*, 34 F.3d 1301, 1305 (7th Cir. 1994) ("An owner or operator of a business thus has a reasonable expectation of privacy in commercial property. This expectation, however, is different from, and indeed somewhat less than, the privacy expectation in one's home.").

212. *Burger*, 482 U.S. at 704-05.

reasonable as to time, place, and scope.²¹³ If the program meets these criteria, then the Fourth Amendment's reasonableness requirement has been fulfilled to permit the inspection because the business owner has sufficient notice that an inspection will take place within the confines of the regulatory regime.²¹⁴

Interestingly, the Court's rationale for finding that automobile junkyards are pervasively regulated, and the concomitant state interest in closely monitoring the area, was that these businesses frequently deal with stolen cars.²¹⁵ The Court took a forgiving approach to the question of pervasiveness, noting that while automobile junkyards are a recent phenomenon, they are similar to secondhand shops and general junkyards, more "traditional" enterprises that have been subject to close regulation.²¹⁶ Moreover, *Burger* worked a subtle change on the law of administrative inspections by permitting the police, rather than civil administrative authorities, to conduct the search. The inspection program appears to be devoted primarily to supporting the police function, *i.e.*, stopping the traffic in stolen automobile parts, rather than ensuring compliance with complex administrative regulations entrusted to a regulatory body with expertise in overseeing the industry.

4. Consistency Among the Shifting Forms of Analysis of the Corporation's Right to Privacy

The corporate search cases show the Court struggling to reconcile the corporation's limited right under the Fourth Amendment with the broader protection afforded to individuals.²¹⁷ The shifting rationales demonstrate

213. *Id.* at 702-03.

214. *Id.* at 711. The dissent vigorously disputed the claim that the statute gave sufficient guidance as to the time, place, and scope of inspections, arguing that "[n]either the statute, nor any regulations, nor any regulatory body, provide limits or guidance on the selection of vehicle dismantlers for inspection. In fact the State could not explain why Burger's operation was selected for inspection." *Id.* at 723.

215. *See id.* at 710 ("Because stolen cars often pass quickly through an automobile junkyard, 'frequent' and 'unannounced' inspections are necessary in order to detect them. In sum, surprise is crucial if the regulatory scheme aimed at remedying this major social problem is to function at all.").

216. *Id.* at 706; *see Stuntz, Privacy's Problem, supra* note 130, at 1058-59 (The Court's approach in *Burger* is criticized because it treats "the junkyard owner's privacy interest as of no account. Once again, the law sets a boundary line, protects privacy on one side of the line, and ignores it on the other. The result is to limit criminal procedure's substantive effect.").

217. *See* Lynn S. Searle, Note, *The "Administrative" Search from Dewey to Burger: Dismantling the Fourth Amendment*, 16 HASTINGS CONST. L.Q. 261, 267 (1989) ("In its struggle to find authority and articulate rationales for warrantless searches, the Court has been unsuccessful in developing and defining consistent criteria. Its decisions, neither comprehen-

that there is no simple basis to explain how much *less* protection a corporation should receive, only that it is not as great as the individual's sphere of privacy. The Court's hesitancy to give corporations too much protection leads instead to rules that severely limit corporate Fourth Amendment rights, such as the result in *Dow Chemical*, in which the Court granted less protection to a corporation's property than an individual's without any cogent explanation.²¹⁸ Similarly, *Burger* expanded the administrative search exception to the warrant requirement by allowing the police to search for evidence of wrongdoing in the guise of enforcing a regulatory scheme to monitor a line of business that employs questionable acquisition practices.

The Fourth Amendment cases establish the corporation's claim to protection from unreasonable searches, but reflective of *Hale v. Henkel*'s initial recognition of corporate rights under the Fourth Amendment, the Court fails to supply consistent or clearly discernible rules for recognizing the scope of the constitutional protection. Simply acknowledging that a corporation has a degree of protection from unreasonable searches and seizures does not provide a framework for distinguishing the extent of corporate rights from that accorded to the individual. The Court's failure to adopt a consistent form of analysis effectively gives the government broad leeway to search for evidence at a business despite language in earlier cases that seemingly equates the corporation's right with the individual's.

When viewed in light of *Hale v. Henkel*'s weighing of the need to permit effective enforcement of the criminal law against corporations with the danger of misuse of the government's power, the Fourth Amendment decisions take on a degree of clarity. The early decisions granting corporations protection, *Silverthorne Lumber*, *American Tobacco*, and *Go-Bart Importing*, involved obvious overreaching by the government. The factual bases of the claims alone permitted the Court to restrain the government without having to explain the limits of the Fourth Amendment's protection for corporations. In *Oklahoma Press* and *Morton Salt*, the government used a less intrusive means of gathering information, and upholding the corporate claims of protection would have undermined the government's enforcement efforts just as surely as permitting a corporation to invoke the privilege against self-incrimination. Absent evidence of governmental misuse of its investigatory power, the Court will give only minimal protection to corporations seeking to resist efforts to gather information that do not involve an actual entry on to a business's premises.

sive nor far-seeing, have dealt with cases on an *ad hoc* basis.").

218. See, e.g., *Hall*, 47 F.3d at 1095 (government agent's removal of shredded documents from a dumpster located on commercial property did not violate Fourth Amendment because business must show it took "the additional precaution of affirmatively barring the public from the area" while an individual need only show actions were not in plain view of others).

The administrative search cases considered an even greater invasion of corporate privacy to gather evidence that can be used in an administrative or criminal proceeding against the organization. Nevertheless, the Court provided a substantially lower degree of protection under the Fourth Amendment, ostensibly because of the diminished expectation of privacy in commercial property. A better understanding of the conclusions in the search decisions results when one notes that the Court imposed the warrant requirement when there was only a minimal danger that a business entity could undermine the government's enforcement effort. The greater the possibility that regulatory or statutory violations can be shielded from the government, the more likely the Court will find that a warrantless search is permissible.

The very concept of a pervasively regulated industry as the basis for permitting a warrantless inspection demonstrates that the Court uses the *need* for close regulation to determine that there is no expectation of privacy sufficient to merit protection of the business premises under the Fourth Amendment.²¹⁹ The reasonableness requirement described in *Burger*,²²⁰ mandating some objective framework for the time, place, and scope of the invasion of the business, is a means to ensure that the government does not misuse its power. Similarly, *Barlow's* represents the Court's effort to impose an outer limit on the government's power to conduct warrantless searches of corporation's by holding that not every regulatory scheme can form the basis for permitting the search of commercial property without a warrant.²²⁰ Without an opinion like *Barlow's*, the exception would truly swallow the rule and create too great a possibility that the government can abuse its power. Even when the Court imposes a warrant requirement, the factual basis for its issuance is diminished because *Barlow's* adopts a lower threshold that does not require the government to provide specific facts to show probable cause to search. Finally, what constitutes a search of an individual's house is not a search, for Fourth Amendment purposes after *Dow Chemical*, when the target is a corporation.

The Court adheres to its mantra that corporations are protected by the Fourth Amendment,²²¹ yet that recitation is largely irrelevant. Instead, the

219. See, e.g., *Lesser*, 34 F.3d at 1307 (The court held that rabbitries were a closely regulated industry based on finding that "[w]hile one may debate why the regulation of rabbitries is a federal matter . . . [A]rguably by taking measures to assure that the animals are accorded the basic creature comforts, the federal government may be of some benefit to [medical] research.").

220. *Barlow's*, 436 U.S. at 324-25 (stating that OSHA regulations do not warrant inspection without a warrant).

221. See, e.g., *Burger*, 482 U.S. at 699 ("An owner or operator of a business thus has an expectation of privacy in commercial property, which society is prepared to consider to be reasonable."); *Barlow's*, 436 U.S. at 315 ("What [employees] observe in their daily functions is undoubtedly beyond the employer's reasonable expectation of privacy. The

corporation has only an abbreviated constitutional protection compared to the individual. While the Court uses the phrase "reasonable expectation of privacy" in relation to the corporation, there is no realistic basis for concluding that a corporate entity has any privacy because that is a term applicable to individuals, not organizations. The Fourth Amendment protects the corporation from the government to the extent that the government may not abuse its power over the corporation, but it does not create an area protected from the scrutiny of the sovereign. Unlike the individual, there is no zone of privacy that a corporation *a priori* may lay claim to under the Fourth Amendment.

V. HOW MANY FIFTH AMENDMENTS ARE THERE FOR CORPORATIONS?

The Supreme Court consistently denied corporations the right to assert the privilege against self-incrimination on the ground that the Fifth Amendment protects the liberty of the individual, not a corporate entity.²²² The Court's analysis, however, begs the question of whether the other Fifth Amendment protections afforded to individuals in criminal prosecutions should also be denied to the corporate defendants. *Hale v. Henkel* finessed the question by asserting that a corporation's rights under the Self-Incrimination Clause are not even implicated because the corporation is not the witness compelled to testify, so there is no constitutional question for the Court to decide.

The Fifth Amendment provides two other specific protections for criminal defendants in addition to the privilege against self-incrimination—the prohibition against placing a person twice in jeopardy for the same offense and the right to indictment by a grand jury.²²³ For the Double

Government inspector, however, is not an employee."); *City of Seattle*, 387 U.S. at 543 ("The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property."). The Court's opinions do not attribute specifically to the corporation the right to privacy, probably because it would be troublesome to ascribe a particularly human trait to a juridical construct. Instead, the Court often refers to the "owner" or "employer" as the possessor of the expectation of privacy, using a verbal sleight-of-hand to avoid stating that a corporation has an expectation of privacy, a potentially objectionable position.

222. See, e.g., *Braswell v. United States*, 487 U.S. 99 (1988); *Hale v. Henkel*, 201 U.S. 43 (1906).

223. The Court has long held that corporations are entitled to the protections of the due process clause under the Fifth and Fourteenth Amendments. See *Pembina Consol. Silver Mining and Milling Co. v. Pennsylvania*, 125 U.S. 181 (1888). That protection applies in both civil and criminal proceedings, but it does not furnish any specific rights beyond the requirement that the procedures comport with basic concepts of fundamental fairness. See, e.g., *Rochin v. California*, 342 U.S. 165, 173 (1952) ("Due process of law, as a[] historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about that offend 'a sense of

Jeopardy Clause, the Court merely assumes that corporations can claim the protection without considering whether the right should be afforded to corporate defendants.²²⁴ The test the Court has adopted for determining the scope of the Indictment Clause, on the other hand, appears to exclude corporations from the right completely.²²⁵ The inconsistent treatment of corporate rights under the Fifth Amendment is traceable to the Court's failure to carry through the form of analysis adopted in *Hale v. Henkel*, which affords constitutional protection to a corporate defendant only when there is a substantial danger that the government will misuse its power and recognition of the corporation's right will not impede the successful enforcement of the criminal law.

A. *Can a Corporation Survive in a "Continuing State of Anxiety and Insecurity"?*²²⁶

1. The Scope of Double Jeopardy

In *North Carolina v. Pearce*,²²⁷ the Supreme Court defined the limits of the Double Jeopardy Clause to three situations: 1) protection against a second prosecution for the same offense after acquittal, 2) protection against a second prosecution for the same offense after conviction, and 3) protection against multiple punishments for the same offense.²²⁸ A primary value of the double jeopardy prohibition is preservation of the finality of a verdict, which prevents the government from using its prosecutorial power to seek added sanctions.²²⁹ The Court has recognized that "permitting the sover-

justice."").

224. See, e.g., *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977); *Fong Foo v. United States*, 369 U.S. 141 (1962).

225. See, e.g., *Mackin v. United States*, 117 U.S. 348 (1886); *Ex parte Wilson*, 114 U.S. 417 (1885).

226. *Green v. United States*, 355 U.S. 184, 187 (1957).

227. 395 U.S. 711 (1969).

228. *Id.* at 717.

229. See George C. Thomas III, *An Elegant Theory of Double Jeopardy*, 1988 U. ILL. L. REV. 827, 850 (1988) (stating that "government can have no legitimate interest in relitigating the fact finder's culpability determination"); Peter J. Henning, *Precedents in a Vacuum: The Supreme Court Continues to Tinker with Double Jeopardy*, 31 AM. CRIM. L. REV. 1, 7-8 (1993) [hereinafter Henning, *Double Jeopardy*] (reviewing theories of double jeopardy protection); see generally *Jeffers v. United States*, 432 U.S. 137, 150 (1977) (stating that the Double Jeopardy Clause prohibits multiple prosecutions for the same offense); *Garrett v. United States*, 471 U.S. 773, 796 (1985) (O'Connor, J., concurring) (stating that government can not later accuse a defendant on a broader offense when the defendant has been already acquitted of a lesser included offense).

eign freely to subject the citizen to a second trial for the same offense would arm Government with a potent instrument of oppression."²³⁰

The double jeopardy protections reflect two related rationales. It prevents the government from misusing its prosecutorial power through repeated trials and excessive punishments, while providing a defendant with a measure of personal repose from the government's legitimate use of its power once the case has concluded.²³¹ The institutional rationale is to prevent "prosecutorial overreaching,"²³² while the Court has summarized the personal rationale of the constitutional protection as preventing repeated trials for the same misconduct that will expose "him to embarrassment, expense and ordeal and compel[] him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."²³³

Although the Court speaks of the Double Jeopardy Clause as barring the government from subjecting a person to repeated trials, it has not credited the Fifth Amendment with a reach quite that broad.²³⁴ As early as 1824, in *United States v. Perez*,²³⁵ the Court stated that a retrial can take place after the judge declared a mistrial when there was a "manifest necessity" for the mistrial, "or the end[] of public justice would otherwise be defeated."²³⁶ A problem with the jury, such as deadlock or a biased or prejudicially influenced panel, is normally the basis for finding manifest necessity.²³⁷ The government can also reprosecute after a successful appeal of

230. *Martin Linen Supply*, 430 U.S. at 569.

231. See Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101, 130-46 (1995) (reviewing limited scope of double jeopardy in preventing retrials and imposition of additional punishments).

232. *Ohio v. Johnson*, 467 U.S. 493, 501 (1984).

233. *Green*, 355 U.S. at 187-88; see Note, *The Applicability of Double Jeopardy Rights to Corporations*, 1977 DUKE L.J. 726, 742 (1977) ("The government is checked from misusing its prosecutorial power to harass those it may perceive as potential or actual adversaries.").

234. See Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1009 (1980) ("If the defendant's feelings and desires were controlling, the latter rulings should confer the same kind of immunity from re prosecution that erroneous acquittals do. Yet they do not."). Jeopardy attaches when the "jury is impaneled and sworn," *Crist v. Bretz*, 437 U.S. 28, 29 (1978), or when the court hears evidence in a bench trial. *Serfass v. United States*, 420 U.S. 377, 388 (1975). See generally Project, *Twenty-Fourth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1993-1994*, 83 GEO. L.J. 665, 1040-50 (1995) [hereinafter *24th Criminal Procedure Project*].

235. 22 U.S. (9 Wheat.) 579 (1824).

236. *Id.* at 580.

237. See *Richardson v. United States*, 468 U.S. 317, 324 (permitting retrial after mistrial due to deadlocked jury); *Arizona v. Washington*, 434 U.S. 497, 515-16 (1978) (manifest necessity when defense opening statement may have biased jurors). The

the dismissal of an indictment when the trial court's order is unrelated to the defendant's guilt or innocence.²³⁸ Moreover, a defendant whose appeal results in reversal of the conviction cannot assert double jeopardy to bar a retrial.²³⁹ Under the dual sovereignty doctrine, a defendant may be prosecuted for misconduct that violates both federal and state laws in separate actions, and acquittal in one jurisdiction does not bar conviction in the other.²⁴⁰ Thus, despite the soaring rhetoric of limiting the government to a single attempt to convict the defendant,²⁴¹ the Double Jeopardy Clause provides less comfort to the defendant than the Court's language suggests.

Hale v. Henkel's interpretation of the Self-Incrimination Clause as a "purely personal" protection appears consistent with the language the Supreme Court has used in later cases to describe one rationale for double jeopardy, that it protects the individual from a "continuing state of anxiety and insecurity"²⁴² about repeated prosecutions when each trial will entail a "heavy personal strain."²⁴³ Whatever "anxiety" a trial engenders in a corporation, one can argue that it is not sufficient to allow corporate assertion of the prior determination as a bar to a subsequent trial for the same misconduct.²⁴⁴ The second rationale of preventing misuse of government power will be raised if the government seeks to retry the defendant for the same violation.

The Supreme Court has never squarely addressed the issue of the Double Jeopardy Clause's applicability to corporations. Rather, the Court assumed initially that a corporation must be protected by the constitutional prohibition when it considered the scope of the Clause's protection in cases brought against corporate defendants. The Court has failed to distinguish between the personal and institutional rationales for the Double Jeopardy Clause by granting corporations the same double jeopardy protection as individuals.

government may also try the defendant again when the defense has moved for a mistrial, unless the prosecution acted in bad faith to induce the defendant into seeking the termination of the trial. *Oregon v. Kennedy*, 456 U.S. 667, 674-75 (1982).

238. *United States v. Scott*, 437 U.S. 82, 98-99 (1978).

239. *United States v. Ball*, 163 U.S. 662, 672 (1896).

240. *Heath v. Alabama*, 474 U.S. 82, 88 (1985).

241. See *United States v. Jorn*, 400 U.S. 470, 479 (1971) (stating that "society's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws").

242. *Green*, 355 U.S. at 187.

243. *United States v. Scott*, 437 U.S. 82, 108 (1978) (Brennan, J., dissenting).

244. See Sally A. Schreiber, *Double Jeopardy and Corporations: "Lurking in the Record" and "Ripe for Decision,"* 28 STAN. L. REV. 805, 814 (1978) ("The fact that corporations lack both life and limb, the two elements expressly protected by the fifth amendment, [sic] might lead to the conclusion that they are not 'persons' protected by the double jeopardy clause.") (footnote omitted).

2. Applying Double Jeopardy to Corporations Without Asking Why

In *Rex Trailer Co. v. United States*,²⁴⁵ the Supreme Court rejected a corporation's argument that a civil penalty assessed for infractions of the Surplus Property Act of 1944 violated the Double Jeopardy Clause when the company earlier entered a plea of *nolo contendere* to criminal charges arising from the same transactions.²⁴⁶ The Court never considered whether a corporation can raise a double jeopardy claim. Instead, it simply reached the substantive issue of whether the second action sought a criminal penalty, holding that the penalty was not a criminal punishment and therefore the civil action did not violate double jeopardy.²⁴⁷ Similarly, in *Puerto Rico v. Shell Co. (P.R.)*,²⁴⁸ the Court in *dicta* stated that the earlier successful prosecution of a corporation for violating the Sherman Anti-Trust Act barred a second prosecution in a territorial court because the cases would arise under the same sovereign.²⁴⁹

The Court's first opportunity to consider directly the issue of a corporation's right under the Double Jeopardy Clause in a criminal prosecution came in *Fong Foo v. United States*,²⁵⁰ but it chose to ignore the question in its brief per curiam opinion. A corporation and two of its employees were the defendants, and after only three witnesses testified, the district judge ordered the jury to return verdicts of not guilty for all defendants.²⁵¹ The lower court based this decision on the "supposed improper conduct" of the prosecutor and "a supposed lack of credibility in the testimony of the witnesses,"²⁵² a reason that the court of appeals found "egregiously erroneous."²⁵³ The Supreme Court did not distinguish among the defendants in concluding that a final judgment of acquittal, no matter how groundless or mistaken, cannot be set aside.²⁵⁴

245. 350 U.S. 148 (1956).

246. *Id.* at 149-50. The government sought a \$2,000 civil penalty for each violation. *Id.* The Court held that the recovery sought by the government was "civil in nature," *id.* at 151, and therefore double jeopardy did not prohibit the second action. *Id.* at 152.

247. *Id.* at 153. The Court reached a similar conclusion in a False Claims Act case. See *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 550 (1943). Thus, the failure to consider the corporate status of the defendant may be explained by the fact that clear precedents controlled the outcome.

248. 302 U.S. 253 (1937).

249. *Id.* at 264 ("The risk of double jeopardy does not exist. Both the territorial and federal laws and the courts, whether exercising federal or local jurisdiction, are creatures emanating from the same sovereignty.").

250. 369 U.S. 142 (1962).

251. *Id.* at 142.

252. *Id.*

253. *Id.* at 142-43.

254. *Id.* at 143 (stating that the Double Jeopardy Clause "is at the very root of the present case, and we cannot but conclude that the guaranty was violated when the Court of

Legal analysis in *Fong Foo* is wanting, although if the corporate defendant had been absent, the failure to discuss any constitutional principles would have been understandable. If only individual defendants were prosecuted, the entry of a verdict of acquittal is the very event that ought to permit a person to invoke the double jeopardy protection.²⁵⁵ The Court, however, did not hint that it considered whether the Double Jeopardy Clause applied to a corporate defendant. Rather, it assumed that the Fifth Amendment protected a corporation from successive prosecutions after entry of a verdict of acquittal to the same extent as an individual defendant.

That conclusion granting full constitutional protection appears to conflict with the Court's analysis in *Hale v. Henkel* that resulted in denying a corporation the right to assert the privilege against self-incrimination in a criminal proceeding. Yet, the Court never acknowledged that its earlier decision on one Fifth Amendment protection led to a completely different result based on the defendant's corporate status. Even if there is a clear rationale for equating the corporation's double jeopardy right with that of the individual, a doubtful proposition given the scope of corporate protection discussed above under the Fourth and Fifth Amendments, the Court made no attempt at providing one in *Fong Foo*.

Lower courts have taken the same approach as *Fong Foo*, uncritically accepting that a corporation's double jeopardy protection is identical to the individual's. In *United States v. Armco Steel Corp.*,²⁵⁶ the government sought to re prosecute corporations on a charge that had been dismissed in an earlier prosecution, an attempt that the federal district court rejected on double jeopardy grounds.²⁵⁷ The court explained that the earlier dismissal was in effect an acquittal, and, without citing any authority, went on to find that "it seems beyond doubt to me that the constitutional jeopardy extended to 'persons' includes corporations, which each of the four remaining defendants is."²⁵⁸

In two district court cases involving American Honda Motor Company, the government sought to prosecute the corporation in different districts for

Appeals set aside the judgment of acquittal and directed that the petitioners be tried again for the same offense").

255. See Thomas, *supra* note 229, at 853 (stating that the principle of verdict finality places all verdicts of acquittal beyond the reach of the government).

256. 252 F. Supp. 364 (C.D. Cal. 1966).

257. *Id.*

258. *Id.* at 368. The district court stated that it could not find authority either way on the question of the application of double jeopardy to corporations, which is unsurprising based on *Fong Foo*'s failure to address the issue. *Id.* The district court's rationale for extending the constitutional protection was that "either directly or indirectly persons own all corporations and thus 'persons' must ultimately suffer whatever penalties are imposed upon the corporations." *Id.* This analysis is reminiscent of the Supreme Court's fictive approach to finding that corporations are "Citizens" of a state for the purposes of determining diversity jurisdiction. See *Bank of the United States v. Deveaux*, 5 (Cranch) 61, 91-92 (1809).

antitrust violations arising out of a nationwide price-fixing scheme to which the corporation had already pleaded guilty in a third district.²⁵⁹ Both courts refused to permit the renewed prosecutions on double jeopardy grounds, again without citing any authority.²⁶⁰ The decisions held that once a defendant has been prosecuted for a single conspiracy, the government could not bring subsequent prosecutions for that same misconduct.²⁶¹ In the *American Honda* cases, the government apparently sought a greater punishment than that imposed in the original proceeding by bringing successive prosecutions against defendants who had already been found either innocent or guilty. The district courts, relying on the Double Jeopardy Clause's protection against subsequent prosecutions after a guilty verdict, rejected the government's attempts to circumvent the earlier adjudication by bringing what arguably were distinct prosecutions in different judicial districts.²⁶²

In addition to prohibiting successive prosecutions, lower courts have barred the government from challenging errors made in the trial court when the corporate defendant has been acquitted. In *United States v. Southern Railway Co.*,²⁶³ the district court had previously dismissed an indictment charging an Elkins Act violation on the ground that the evidence did not show any criminal conduct.²⁶⁴ In the appeal by the government, the United States Court of Appeals for the Fourth Circuit found that the district court's decision amounted to an acquittal, and therefore double jeopardy prohibited any further proceedings.²⁶⁵ The circuit court cited *Fong Foo* and *Armco Steel Corp.* for the proposition "that the double jeopardy clause of the Fifth Amendment has been applied to corporations as well as to natural persons."²⁶⁶

259. *United States v. American Honda Motor Co.*, 273 F. Supp. 810, 811-12 (N.D. Ill. 1967); *United States v. American Honda Motor Co.*, 271 F. Supp. 979, 980-81 (N.D. Cal. 1967).

260. *American Honda*, 273 F. Supp. at 819; *American Honda*, 271 F. Supp. at 986.

261. *American Honda*, 273 F. Supp. at 819 ("The prohibition of the Fifth Amendment against double jeopardy cannot be evaded by fragmentation."); *American Honda*, 271 F. Supp. at 986 (stating that "such conspiracy should not and cannot be so fragmented that defendant American Honda, having once been prosecuted, convicted and penalized for its conspiratorial activity, cannot be again so prosecuted . . . such would be contrary to the double jeopardy provision of the Fifth Amendment"); see also *United States v. United States Gypsum Co.*, 404 F. Supp. 619, 622-23 (D.D.C. 1975) (dismissing on double jeopardy grounds, without considering whether corporation protected by Double Jeopardy Clause, contempt charges against corporation for violating antitrust consent decree when corporation already prosecuted for criminal violation involving same conduct as contempt charge).

262. *American Honda*, 273 F. Supp. at 819; *American Honda*, 271 F. Supp. at 988.

263. 485 F.2d 309 (4th Cir. 1973).

264. *Id.* at 311.

265. *Id.* at 312.

266. *Id.* The Fourth Circuit refused to consider the propriety of the district court's

The United States Court of Appeals for the Second Circuit took the same approach to a government appeal of the trial court's jury instructions in *United States v. Security National Bank*.²⁶⁷ Rather than rely on *Fong Foo*'s assumption that corporations are protected by the Double Jeopardy Clause, the Second Circuit defended the Supreme Court's lack of analysis in that opinion by asserting that "[a]t most, there was a failure by the Court to set forth the reasons why it adopted petitioner's position."²⁶⁸ The circuit court then took it upon itself to supply those missing reasons. According to the Second Circuit, the double jeopardy protection should be extended to corporations because many such entities have few or only one shareholder, and "[t]he small entrepreneur is not spared the embarrassment, expense, anxiety and insecurity resulting from repeated trials on criminal charges, simply because he has incorporated his modest business."²⁶⁹

Security National makes a viscerally appealing argument that the danger of governmental misuse of its prosecutorial resources to overwhelm a small business requires extending the double jeopardy protection to every corporation.²⁷⁰ Yet, that analysis is equally compelling for the Self-Incrimination Clause; when a corporation with a single shareholder is subpoenaed by the government for its business records, the individual shareholder is effectively required to incriminate himself "simply because he has incorporated his modest business."²⁷¹ *Braswell v. United States*²⁷² settled the self-incrimination issue for closely-held corporations, however, by holding that *every* corporation was prohibited from asserting the privilege.²⁷³ That rule applies regardless of the corporation's size or the incriminating effect that providing information may have on the individual shareholder. An emotional argument to protect the powerless small businessperson does not assist in reconciling the denial to *any* corporation the protection of the Self-Incrimination Clause with *Fong Foo*'s

actions because it had determined that it had no jurisdiction to hear the appeal once the trial court entered the judgment of acquittal. *Id.*

267. 546 F.2d 492 (2d Cir. 1976), *cert. denied*, 430 U.S. 950 (1977).

268. *Id.* at 493. The Second Circuit relied on the fact that the petitioner's brief in *Fong Foo* raised the question of double jeopardy's applicability to corporations as the basis for finding that the Supreme Court must have decided the issue. The fact that a party advanced an argument which the Supreme Court did not address in its opinion hardly rises to the level of deciding the scope of a constitutional right, especially when recognizing a corporation's right could conflict with another decision, *Hale v. Henkel*, which denied a constitutional protection under the same Amendment.

269. *Id.* at 494.

270. *See id.* at 495 ("In this unequal contest, 'fundamental fairness' requires that the Government, having had a full try at establishing criminal wrongdoing, shall not have another.").

271. *Id.* at 494.

272. 487 U.S. 99 (1988).

273. *See id.* at 102-04, 110.

assumption of complete protection for *all* corporate defendants under the Double Jeopardy Clause.

The Supreme Court had a second opportunity to address the applicability of the Double Jeopardy Clause to corporations in *United States v. Martin Linen Supply Co.*²⁷⁴ The district court entered judgments of acquittal for two defendant corporations after discharging the jury because it was deadlocked,²⁷⁵ and the prosecution appealed the lower court's order.²⁷⁶ The government's authority to appeal in a criminal case lies in 18 U.S.C. § 3731, which permits appeals in criminal cases except "where the double jeopardy clause of the United States Constitution prohibits further prosecution."²⁷⁷ Relying on *Fong Foo* for the proposition that any verdict of acquittal is "dispositive" on the issue, the Court held that entry of the judgment precluded the government from having the statutory authority to appeal because any consideration of the merits of the appeal would violate the Double Jeopardy Clause.²⁷⁸

Martin Linen Supply took for granted a corporation's double jeopardy right without considering whether it was coextensive with the individual's. The Court's automatic assumption that a verdict of acquittal prohibits a reprosecution, no matter how flagrantly erroneous that verdict may be, gives corporations greater protection than they should be entitled to in light of the two rationales for the Double Jeopardy Clause and the need to protect corporations from misuse of governmental power.

3. Limiting Corporate Double Jeopardy Rights: The Power to Appeal Acquittals

The Double Jeopardy Clause can permit a potentially guilty defendant to escape punishment when a jury misunderstands the court's instructions, the court gives an erroneous instruction resulting in an acquittal, or the jury decides to exercise its power to nullify the law by returning a verdict of acquittal.²⁷⁹ Similarly, the trial court can dismiss a case after jeopardy has

274. 430 U.S. 564 (1977).

275. *Id.* at 565-66. For the procedure regarding motions of acquittal, see FED. R. CRIM. P. 29(c) which states:

If the jury . . . is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. . . . If no verdict is returned the court may enter judgment of acquittal.

276. *Martin Linen Supply*, 430 U.S. at 567.

277. 18 U.S.C. § 3731 (1988).

278. 430 U.S. at 573 ("Since Rule 29 merely replaces the directed-verdict mechanism employed in *Fong Foo* . . . no persuasive basis exists for construing the Rule as weakening the trial court's binding authority for purposes of double jeopardy.").

279. See Westen, *supra* note 234, at 1012 (suggesting that jury nullification is a basis for the double jeopardy protection).

attached, and that decision cannot be appealed if the court based the dismissal on the government's failure to prove guilt beyond a reasonable doubt.²⁸⁰ Preventing a retrial based on an erroneous legal or factual conclusion can be justified when it results in the acquittal of an individual defendant because the trial, and not just the punishment, is a severe hardship. As the Court recognized in *Green v. United States*,²⁸¹ the government cannot use its power to subject a person "to embarrassment, expense and ordeal and compel[] him to live in a continuing state of anxiety and insecurity."²⁸² Nevertheless, the Constitution does tolerate some measure of extended exposure to prosecution by countenancing a retrial after a mistrial, provided there is "manifest necessity,"²⁸³ or after a defendant appeals a conviction successfully and the appellate court orders a retrial.²⁸⁴

The first rationale of double jeopardy, to safeguard the defendant's state of mind, does not apply when a corporation or other business organization asserts the constitutional protection because those entities cannot feel embarrassment and do not experience anxiety and insecurity, except perhaps metaphorically. The highly personal aspect of the Double Jeopardy Clause makes it inappropriate as the basis for extending the provision's full protection to corporations. The second rationale for the double jeopardy safeguard is that the provision constrains the use of prosecutorial resources to prevent harassment through repeated trials until a conviction can be obtained. Unlike the first rationale, this concern *is* applicable to any potential defendant, corporate or individual.

These two rationales of the Double Jeopardy Clause are not implicated in every prosecution of a corporation, so it is possible for the Supreme Court to distinguish between individuals and corporations in determining the scope of protection. The Court's approach to double jeopardy should be similar to its Fourth Amendment analysis of the privacy rights of businesses, to the extent that the Court acknowledges the expectation of privacy for a business is not coextensive with the individual's protection.

Although society may be willing to prohibit a second prosecution when the specter of repeated trials takes too great a personal toll on the individual, that is not necessarily the case when the corporation that is the subject of the prosecution cannot experience the same hardship and oppression.²⁸⁵

280. See *Lee v. United States*, 432 U.S. 23, 29-30 (1977). In *Lee* the Supreme Court held that the dismissal of an indictment after trial had begun, which is when jeopardy attaches, does not prevent a retrial when the trial court's dismissal was not related to the guilt or innocence of the defendant. *Id.* at 33-34. In that case, the dismissal is akin to a mistrial, after which the government normally has the right to retry the defendant. *Id.* at 32-33.

281. 355 U.S. 184 (1957).

282. *Id.* at 187.

283. *Perez*, 22 U.S. (9 Wheat.) at 580.

284. *Ball*, 163 U.S. at 669.

285. See Westen, *supra* note 234, at 1009 ("Accordingly, regardless of how much

At the same time, there remains the need to constrain misuse of governmental power, both in the search for evidence of crimes, which is governed by the Fourth Amendment, and the prosecution of offenses, which invokes the Double Jeopardy Clause. Having recognized *sub silentio* the corporation's double jeopardy right in *Martin Linen Supply*, the Court should also consider the circumstances in which the Fifth Amendment claim arises.

The initial inquiry in corporate double jeopardy cases should be to determine whether invocation of the right will prevent the government from misusing its power. That inquiry is appropriate for any defendant. The second inquiry should be to determine whether the principal reason for granting double jeopardy protection in a particular case rests on the underlying policy of shielding the defendant's emotions from further harm wrought by a criminal prosecution.²⁸⁶ To the extent that granting the right only minimally affects prosecutions of corporations while lessening the possibility of misuse of the government's power, then the corporation should be able to assert the right.

The Court ought to recognize the constitutional protection for corporations in two types of double jeopardy cases. First, cases involving a second prosecution for the same violation should not be permitted against corporate defendants.²⁸⁷ The repeated conspiracy indictments in the *American Honda* cases illustrate that reprosecution for the same crime after conviction can be an effort to harass a defendant through misuse of the government's power to apply its resources and authority anywhere in the United States. Second, attempts to inflict multiple punishments on the corporation, to the extent the additional punishment is not authorized by the legislature, should not be sanctioned by the Court. Any punishment greater than that adopted by the legislature is an obvious misuse of judicial authority to the detriment of the defendant. The Court has recognized these two aspects of the double jeopardy protection as a means to prevent the government from abusing its power.

The only type of case in which the corporation's double jeopardy right should not be coextensive with the individual's is a second prosecution after an acquittal. More specifically, the issue is not the second prosecution, but the government's power to appeal the acquittal and, if it is successful, to reprosecute the charges. The Double Jeopardy Clause incorporates the principle of collateral estoppel, so the government cannot bring a second

weight one attaches to a defendant's feelings of joy over a favorable outcome, there is no basis for according greater finality to an erroneous acquittal than to a reversed conviction.").

286. The Double Jeopardy Clause is not, of course, so easily bifurcated, and one can argue cogently that both policies are implicated in every case.

287. See *Blockburger v. United States*, 284 U.S. 299, 304 (1932) ("Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.").

prosecution based on the same facts which a jury or the court has already determined do not constitute a criminal violation.²⁸⁸ The government's sole response to a fundamentally flawed acquittal should be an appeal to permit the reviewing court to consider the alleged error.²⁸⁹

There is an intuitive sense that once a person is acquitted of the crime, the judicial process is complete and any retrial must be purely vindictive. But the facts in *Fong Foo* show that the acquittal may be a miscarriage of justice, and the significant harm inflicted by the erroneous decision is on society and not the defendant, who receives a windfall if guilty of the crime. That undeserved benefit may be an acceptable cost under the Constitution when the defendant is an individual because society does not want its members to live with the insecurity that the government may seek to try them again after an acquittal. The same price is not necessarily acceptable, however, when a corporation that cannot feel anxiety and insecurity receives the windfall and the government's enforcement effort is adversely affected.

If the court or jury acquits a corporation due to an error, there should be a chance to correct that failure by permitting appeal. The government's appeal is not a misuse of its power because if an appellate court finds error significant enough to order a retrial, then the government's power has been vindicated. If the appeal is unsuccessful, then the cost to the corporate defendant is that of defending the lower court's decision, which in most cases is not as significant as that of defending the case in the trial court. If the defendant is successful and the appellate court sustains the acquittal, then there will not be a second trial.

The proper standard of review for considering a government appeal of the acquittal of a corporate defendant should be strict enough to deter appeals of merely questionable rulings that are not sufficiently obvious or egregious to warrant the threat of continuing jeopardy for the corporate defendant. A satisfactorily high threshold that will still allow the government to seek correction of errors that led to an acquittal can be found in the plain error rule of the Federal Rules of Criminal Procedure.²⁹⁰ In *United States v. Olano*,²⁹¹ the Supreme Court explained the plain error standard by stating that the court of appeals should correct a plain forfeited error

288. See *United States v. Dixon*, 113 S. Ct. 2849, 2863 n.15 (1993) (Prosecutors who bring a second prosecution for the same acts "have little to gain and much to lose . . . [An] acquittal in the first prosecution might well bar litigation of certain facts essential to the second one."); *Ashe v. Swenson*, 397 U.S. 436, 446 (1970) (explaining that double jeopardy "protects a man who has been acquitted from having to 'run the gauntlet' a second time.") (quoting *Green v. United States*, 335 U.S. 184, 190 (1957)).

289. Cf. Office of Legal Policy, U.S. Department of Justice, *Double Jeopardy and Government Appeals of Acquittals*, 22 MICH. J.L. REF. 837, 839 (1989) (government should be permitted to appeal acquittals of bench trials).

290. FED. R. CRIM. P. 52(b) ("Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

291. 507 U.S. 725 (1993).

affecting substantial rights if the error “‘seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.’”²⁹²

Requiring the government to show plain error to reverse the acquittal of a corporate defendant would only allow retrials when the error demonstrably affected the outcome, and not just that the verdict *may* have been different absent the error.²⁹³ The real cost that a corporation would face without the full protection of the Double Jeopardy Clause are those involved in the government’s appeal of the acquittal, not that an overzealous prosecutor can institute a second prosecution for the same violation automatically or can simply refile charges in another district capriciously.²⁹⁴

292. *Id.* at 732 (quoting *United States v. Young*, 470 U.S. 1, 15 (1985)). The government’s burden on appeal would probably insulate instances of jury nullification, to the extent that they occur when a corporation is the defendant. When the government charges the corporation together with an agent, the jury is more likely to acquit the individual and convict the corporate defendant. In *United States v. Hughes Aircraft*, 20 F.3d 974 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 482 (1994), the circuit court upheld a corporation’s conviction for conspiracy even though the jury found the only individual charged as a co-conspirator not guilty. *Id.* at 976-77. If the jury finds the corporation not guilty on the ground of jury nullification, it is highly unlikely that there would not be some evidence in the corporate defendant’s favor on which a jury *could* have decided. In effect, an appellate court considering the government’s appeal could avoid a jury nullification argument by focusing on the evidence, however thin, that supports the jury’s verdict.

293. An additional protection in the federal system is that appeals by the United States must be approved by the Solicitor General, not just the United States Attorney’s office involved in the prosecution. 18 U.S.C. § 3742(b) (1988). This provides an additional layer of review to ensure that any appeal is meritorious and consonant with the government’s broader law enforcement program, and not just the product of the individual prosecutor’s desire to obtain a conviction.

294. The recent decision in *United States v. General Electric Co.*, 869 F. Supp. 1285 (S.D. Ohio 1994), illustrates the type of case in which a government appeal could be allowed, if sufficient error affects the decision to acquit. The case involved an alleged antitrust conspiracy between General Electric and DeBeers to raise the list price of industrial diamonds. *Id.* at 1288. The district court granted General Electric’s motion for a judgment of acquittal under Rule 29(a) of the Federal Rules of Criminal Procedure at the close of the government’s case, on the ground that the government’s evidence, even viewed in the most favorable light, would not permit a rational trier of fact to find the defendant guilty. *Id.* at 1288-89. If the government determines that there were grounds that meet the plain error standard to challenge the judge’s conclusion that no jury could find the defendant guilty, then permitting the appeal will not impose any psychic costs on General Electric. The government’s burden on appeal would be almost impossible to meet, given that the trial judge based the decision in part on weighing the credibility of the witnesses’ testimony, so it is unlikely that pursuing the appeal would be in the government’s interest. Nevertheless, the government should not be automatically precluded from having that decision reviewed by an appellate court solely on the ground that the defendant, a multi-billion dollar enterprise, should not be required to suffer the anxiety of possible retrial if the government were allowed to appeal the dismissal.

The analytical shortcoming of not adopting the approach suggested here and instead accepting the complete double jeopardy protection for corporations was illustrated in *United States v. Hospital Monteflores, Inc.*²⁹⁵ A hospital and its medical director were indicted for submitting false Medicare reimbursement forms.²⁹⁶ After the close of the government's case, the district court entered a judgment of acquittal, and the government appealed only as to the corporate defendant.²⁹⁷ The United States Court of Appeals for the First Circuit dismissed the appeal, holding that corporations receive the same double jeopardy protection as individuals.²⁹⁸ The First Circuit defended its position on the policies underlying the Double Jeopardy Clause, taking "judicial notice of the fact that corporate well-being is heavily dependent on that elusive quality known as 'good will'" and that "[c]orporations can be made very insecure by prolonged periods of bad publicity."²⁹⁹

Anthropomorphizing an entity in order to stretch the Double Jeopardy Clause rings hollow when the result is a strained attempt to identify insecurity in a corporation by enlarging the accounting concept of good will as a substitute for human emotions. In much the same way that *Security National* identified the burdens a small corporation would endure if it cannot assert the double jeopardy protection, *Hospital Monteflores* tried to justify a broad application of the Double Jeopardy Clause by making the corporation as much like the individual as possible. The Supreme Court, however, has never taken that approach in determining a corporation's criminal constitutional rights, and the anthropomorphic analysis begs the underlying question of why the mere fact of negative publicity should justify the full protection of the Double Jeopardy clause.³⁰⁰

The double jeopardy analysis of *Security National* and *Hospital Monteflores* takes the concept of corporate "emotions" too far by ignoring the fact that a governmental appeal of the acquittal would not have significantly exacerbated the suffering already experienced by the corporations. Unlike the individual defendant, who may be forced to remain in jail or be subject to bail conditions, a corporation does not suffer any direct restraint from the government's appeal. Moreover, the initial indictment inflicted the notable harm to institutional good will, and the acquittal can be

295. 575 F.2d 332 (1st Cir. 1978).

296. *Id.* at 333.

297. *Id.* ("It has not pursued an appeal against the individual defendant, but argues that the appeal as to the corporation can proceed because the Double Jeopardy Clause does not protect corporations.").

298. *Id.* at 335.

299. *Id.* The appellate court conceded that "corporations do not have human emotions, but that does not mean that they do not 'suffer' during criminal trials in the sense of experiencing harm to a legitimate, protectible interest." *Id.*

300. See *infra* note 313 (stating that adverse publicity alone should not be the basis for extending the protection of the Indictment Clause to corporations).

publicized to dissipate the effect of the indictment. *Hospital Monteflores* never explained why the appeal would make the harm from the initial indictment any more profound if the acquittal were found erroneous and the prosecution reinstituted.³⁰¹

The cost to society of permitting a groundless acquittal based on an erroneous legal analysis by the trial court is that the corporation may continue to operate at the edge of the law while relying on the acquittal as a plausible argument that any further governmental enforcement proceedings would constitute harassment or displeasure with the result of the first prosecution. While that cost may be acceptable when an individual is the defendant, sparing the person from another trial in order to live in peace, permitting a corporation to continue an economic operation that arguably violates the law does not comport with the values protected by the Double Jeopardy Clause. The better approach would be to permit government appeals so that the appellate courts could decide whether, taking all the evidence in the light most favorable to the defendant, there was an error of sufficient magnitude to "have affected the outcome of the district court proceedings."³⁰²

Nevertheless, it must be acknowledged that there is a basis for the concerns expressed by the circuit courts in *Hospital Monteflores* and *Security National* about the effect of a criminal prosecution on a corporate entity. The impact could be especially acute when the corporation is a small, closely-held company in which the individual owners suffer from the government's actions directly. In that circumstance, the cost of defending a judgment on appeal cannot always be absorbed by the enterprise, particularly if the case reaches the Supreme Court.

The Double Jeopardy Clause, however, is not based on protecting a defendant from the monetary costs of a criminal prosecution. Moreover, extending double jeopardy to *all* corporations on the basis that emotionally alluring "mom-and-pop" businesses that could be overwhelmed by the government's power to appeal an acquittal is over-inclusive. Granting complete protection to all corporate defendants means that every large-scale business organization can assert the double jeopardy right regardless of the

301. The analysis advanced here does not address the problem of continuing negative publicity resulting from a retrial if the government succeeds in its appeal. The bulk of the negative publicity, however, will usually attend the initial filing of the criminal action and coverage of the first trial. That a corporation may receive additional community approbation because the government can retry the corporate defendant does not mean that *every* corporation should receive the full benefit of the Double Jeopardy Clause. The standard proposed here for reversing the acquittal and permitting a second trial is high, and the instances of retrials after verdicts of acquittal will probably be rare. The idea of a continuing threat to corporate goodwill from a retrial, beyond the effect of the initial charge and trial, should not outweigh the need to protect against granting corporate defendants a windfall from erroneous acquittals based on legal errors by the trial court.

302. See *Olano*, 507 U.S. at 734.

pecuniary effect of a governmental appeal. If the policy concern is to protect small businesses, then the legislature can address that issue by permitting corporations to recover their attorney fees in cases in which the government appeal is unsuccessful.³⁰³ As a matter of constitutional analysis, the possibility of requiring corporate defendants to pay out additional sums in the small number of cases in which the government might appeal should not determine the scope of the Double Jeopardy Clause.

There is no question that the double jeopardy protection for corporations is well-established, even though the foundation for that position does not comport with the Supreme Court's treatment of corporate rights under the Fifth Amendment's privilege against self-incrimination. Lower courts have taken *Fong Foo* and *Martin Linen Supply* to mean that corporations have protection identical to the individual under the Double Jeopardy Clause. That is a credible reading of the cases that only the Supreme Court can correct. The problem for the government is its ability to make a plausible argument in light of the apparently consistent line of cases rejecting appeals of allegedly erroneous acquittals of corporate defendants.³⁰⁴ Although a vehicle may be hard to find, an analysis of the Double Jeopardy Clause that is consistent with the Court's Self-Incrimination Clause and Fourth Amendment holdings on corporate constitutional rights strongly favors a rule permitting the government to appeal erroneous acquittals and, if successful, to reprosecute the corporate defendant.

*B. Does a Corporation Have the Right to an
Indictment by a Grand Jury?*

The Supreme Court has decided a corporation's right under the Double Jeopardy Clause through inattention to the nature of the corporate defendant, while it has never considered the question of whether a corporation has a right to demand that it be indicted by a grand jury. The Fifth Amendment provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury

303. The federal government already provides for the recovery of costs and fees in civil and administrative actions under the Equal Access to Justice Act, 28 U.S.C. § 2412 (1988). An additional provision could provide for recovery in criminal cases in which the government appeals after a judgment of acquittal.

304. The line of authority begins with *Fong Foo* and *Martin Linen Supply*, which do not analyze the corporation's double jeopardy rights, and includes *Security National* and *Hospital Monteflores*, which reject governmental appeals of acquittals without considering the substantive merits. For example, in *United States v. Ashland Oil, Inc.*, 537 F. Supp. 427 (M.D. Tenn. 1982), the district court cited *Hospital Monteflores* for the proposition that "[t]he double jeopardy prohibition applies equally to corporate as well as individual defendants in criminal cases." *Id.* at 429 (citing *United States v. Hospital Monteflores* 575 F.2d 332, 335 (1978)).

...³⁰⁵ The key issue for individual defendants is the determination of what constitutes an "otherwise infamous crime" that triggers the protection.

In the late nineteenth century, the Supreme Court defined infamous crimes as those for which the authorized punishment is a term of imprisonment in a penitentiary³⁰⁶ or at hard labor.³⁰⁷ In creating a bright line for requiring a grand jury indictment, the Court explained: "What punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another. In former times, being put in the stocks was not considered as necessarily infamous."³⁰⁸ The Court has also held, however, that the Due Process Clause does not require the states to proceed by grand jury indictment even though the crime would be labeled as "infamous" in the federal system.³⁰⁹

The grand jury has a distinguished pedigree, dating to twelfth-century England, and the Court acknowledged that "our constitutional grand jury was intended to operate substantially like its English progenitor."³¹⁰ In *Hale v. Henkel*,³¹¹ the Court recounted that "the most valuable function of the grand jury was not only to examine into the commission of crimes, but to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will."³¹²

305. U.S. CONST. amend. V.

306. *Mackin*, 117 U.S. at 352 ("We cannot doubt that at the present day imprisonment in a State prison or penitentiary, with or without hard labor, is an infamous punishment.").

307. *Ex parte Wilson*, 114 U.S. at 429 ("Our judgment is that a crime punishable by imprisonment for a term of years at hard labor is an infamous crime, within the meaning of the Fifth Amendment of the Constitution . . .").

308. *Id.* at 427. The Federal Rules of Criminal Procedure incorporate the Court's analysis of infamous crimes in Rule 7(a), which requires indictments for all cases that meet the constitutional minimum:

An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

FED. R. CRIM. P. 7(a).

309. See *Hurtado v. California*, 110 U.S. 516, 538 (1884).

310. *Costello v. United States*, 350 U.S. 359, 362 (1956). For a review of the history of the grand jury, see generally Fred A. Bernstein, Note, *Behind the Gray Door: Williams, Secrecy, and the Federal Grand Jury*, 69 N.Y.U. L. REV. 563, 574-82 (1994); William F. Jung, Note, *Recognizing a Corporation's Rights Under the Indictment Clause*, 1983 U. ILL. L. REV. 477, 479-82 (1993).

311. 201 U.S. 43 (1906).

312. *Id.* at 59; see Bernstein, *supra* note 310, at 574 ("The grand jury was regarded as protection from prosecutorial overreaching."). A federal grand jury can investigate any crime within its jurisdiction by subpoenaing witnesses to testify and requiring the production of documents for its examination to determine whether probable cause exists that a crime has

The constitutional minimum for invoking the Indictment Clause appears to exclude corporations because they can be sentenced to neither a penitentiary nor a term of hard labor.³¹³ The Supreme Court's reading of "infamous crimes" has led lower courts which have considered the question to hold that corporations cannot invoke the constitutional protection. In two decisions in the United States Court of Appeals for the Ninth Circuit, *United States v. Yellow Freight System, Inc.*³¹⁴ and *United States v. Armored*

been committed. *United States v. Williams*, 504 U.S. 36, 48-49 (1992); *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 423 (1983); *see generally 24th Criminal Procedure Project, supra* note 234, at 850-56 (reviewing the powers of the grand jury). Coupled with the grand jury's broad investigative power is the potential defendant's lack of meaningful access to the accusatory process. A witness is not permitted to have an attorney present while appearing before the grand jury, *see In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238, 251 (2d Cir. 1985) (en banc) (holding that removal of counsel from grand jury does not violate right to counsel), *cert. denied sub nom. Roe v. United States*, 475 U.S. 1108 (1986); the exclusionary rule does not apply to the proceedings, *United States v. Calandra*, 414 U.S. 338, 351-52 (1974); and, the government is not required to present exculpatory evidence to the grand jury before an indictment is returned, *Williams*, 504 U.S. at 52. Indeed, the prosecutor's power to exert substantial control over the proceeding has been severely criticized for making the grand jury an ineffectual means of protecting the individual from the unfettered power of the government. *See United States v. Mara*, 410 U.S. 19, 23 (1973) (Douglas, J., dissenting) ("It is, indeed, common knowledge that the grand jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive."); Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463, 469-75 (1980) (advocating incorporation of various protections in the grand jury stage); Bernstein, *supra* note 310, at 577 ("As for the indicting grand jury: if the grand jury as sword is somewhat dulled, the grand jury as shield is riddled. That the indicting grand jury has surrendered to the very prosecutorial power against which it was meant to protect is well-established.") Nevertheless, the Supreme Court continues to acknowledge the crucial role the grand jury plays in the American system of criminal justice, and it is unlikely that it will pass from the scene. *See Williams*, 504 U.S. 47.

313. A broad interpretation of infamy could incorporate the concept of "stigma," that the very act of accusing a defendant is sufficiently infamous that a grand jury should make the indictment decision and not just the individual prosecutor acting through the filing of an information. For example, a student author argues that "[i]nfamy is a product of ignominious public opinion, 'a most terrible weapon.' A grand jury affords an accused as much protection from a punishment which will bring him infamy as from a punishment which will bring him death." Jung, *supra* note 310, at 499 (footnote omitted). The problem with using adverse publicity as the basis for deciding whether a crime is infamous for constitutional purposes is that virtually every criminal charge could theoretically be infamous. One need only conceive of the effect of an apparently minor criminal charge on a major political figure or religious leader to theorize that *any* criminal action must first be considered by a grand jury. Corporations are no less susceptible to being stigmatized by a criminal charge than an individual, so it is hard to conceive of a separate analysis for corporate defendants that would not radically alter the scope of the grand jury protection for individuals. *See infra* note 321.

314. 637 F.2d 1248 (9th Cir. 1980), *cert. denied*, 454 U.S. 815 (1981).

Transport, Inc.,³¹⁵ the circuit court rejected arguments by corporate defendants that the prosecutions violated their right to a grand jury indictment. In *Yellow Freight*, the court held that prosecution under the Elkins Act did not constitute an infamous crime because "[t]he class of inherently infamous crimes, if it exists at all, would encompass only the most serious *mala in se*. Regulatory crimes, such as those charged in this case, are not inherently infamous."³¹⁶

In *Armored Transport*, the court found the grand jury indictment invalid, but it went on to declare that the indictment constituted a valid information filed against the company, and therefore the case could proceed on that basis.³¹⁷ The Ninth Circuit held that the corporation had no right to an indictment because the "potential punishment must be infamous, and a fine, levied against either an individual or a corporation, simply does not fit within the meaning of that word, as interpreted by the Supreme Court."³¹⁸

Although the Indictment Clause is a means of constraining the government's power, the protection provided for individuals is not coextensive with the risk of misuse of the prosecutorial power. If a crime is punishable by a term of imprisonment that does not involve incarceration in a penitentiary or a term of hard labor, a category which includes a large number of so-called "petty" offenses, then a fair reading of the Court's analysis is that the defendant's interests do not outweigh the discretion afforded the prosecutor to commence cases in a summary fashion. Moreover, the Fifth Amendment protection is not imposed on the states; the Supreme Court recognized as far back as 1884 in *Hurtado v. California*³¹⁹ that protection of the individual did not require the use of an indicting grand jury.³²⁰

315. 629 F.2d 1313 (9th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981).

316. *Yellow Freight*, 637 F.2d at 1254.

317. *Armored Transport*, 629 F.2d at 1315. The grand jury returned the indictment after its term expired, and therefore the indictment was invalid. *Id.* The defendant corporation had entered a plea of *nolo contendere*, and upon learning that the indictment was invalid, it sought to withdraw its plea. *Id.*

318. *Id.* at 1319. The United States District Court for the Eastern District of New York reached the same conclusion, in a case again involving an invalid grand jury indictment, in *United States v. Macklin*, 389 F. Supp. 272 (E.D.N.Y.), *aff'd*, 523 F.2d 193 (8th Cir. 1975). The district court stated that because corporate defendants are not subject to a term of imprisonment upon conviction, "the charges against them are not 'infamous' within the meaning of the fifth amendment." *Id.* at 273.

319. 110 U.S. 516 (1884).

320. *Id.* at 534-35; see *Lem Woon v. Oregon*, 229 U.S. 586, 590 (1913) (due process does not impose on states the requirement that there be an examination of the charges prior to the formal accusation of the district attorney). The Indictment Clause is the only criminal provision of the Bill of Rights that the Supreme Court has not applied to the states through the Due Process Clause of the Fourteenth Amendment. LAFAYE & ISRAEL, *supra* note 22, § 15.1(a), at 686.

While the Court has noted that the category of infamous crimes is not limited to violations which are punished by incarceration, it has never found any crime that rises to the level of infamy that does not at least include a term of imprisonment. The danger addressed by the Indictment Clause is misuse of the government's power to *punish* defendants, not to shield individuals from being charged with crimes. The potential misuse of governmental power may include the decision to prosecute, but the Supreme Court's application of the authorized punishment as the bright-line test of an "infamous crime" shows that the ultimate goal of requiring a grand jury in certain federal prosecutions is to protect the individual's interest in not being incarcerated by means of prosecutorial overreaching. In that sense, the Indictment Clause protects individuals from misuse of the government's power by ensuring that their punishment will only be imposed after a scrupulously fair proceeding initiated after a determination of probable cause.

A corporation cannot be given a sentence that reaches the constitutional point of incarceration at hard labor or in a penitentiary that invokes the Fifth Amendment protection. The exclusion of corporate defendants from this protection represents a determination that the possibility of governmental misuse of its power does not outweigh the burden of imposing greater procedural requirements on the government. The corporation cannot establish that it will be substantially harmed when the government proceeds by way of an information rather than an indictment, in much the same way that charging an individual with a petty crime not punishable by incarceration in a penitentiary or a term at hard labor does not present a threat of government misuse of power sufficient to require the procedural protection of convening a grand jury to determine probable cause.

The Indictment Clause involves a balancing of interests, so that the effect of governmental misuse of its power will be most strongly felt when a defendant is subject to imprisonment in a penitentiary or a term of hard labor. Short of that line, the Constitution does not impose the procedural requirement that the government present its case to a grand jury and seek an independent review to determine whether there is probable cause that a crime has been committed. The corporation runs the risk of having a fine imposed, but that penalty does not rise to the level of harm that a substantial prison sentence inflicts on an individual. An expansive definition of infamous crimes to protect the interests of the corporation would require attributing anthropomorphic qualities to a corporate defendant in order to grant greater protection to a business entity than individual defendants receive under the Fifth Amendment.³²¹

321. Recasting the Fifth Amendment's scope of protection to provide corporate defendants with the right to indictment by a grand jury would require giving corporations greater rights than individuals receive, or lowering the threshold to trigger the Indictment Clause so much that virtually every federal offense will compel the government to proceed

C. Conclusion

The invariable, and even expansive, denial of the privilege against self-incrimination for a variety of organizations, including a single-shareholder corporation, shows that the Court is not willing to allow the government's enforcement program to be adversely affected by permitting any corporate claim of the privilege. The Indictment Clause's applicability to corporations has not reached the Supreme Court, but the two lower court decisions on the question deny the corporate claims.³²² The Court's analysis of the Self-Incrimination and Indictment Clauses does not depend on the ontological nature of the corporation, thus arguments seeking to equate the corporation's constitutional status with that of the individual ring hollow. The provisions operate in much the same fashion, omitting corporations from the definition of those who can enjoy the right provided by the Fifth Amendment.

On the other hand, rather than asking the initial question of whether the Double Jeopardy Clause applies to corporations, the Court assumes uncritically the same protection for corporate defendants as that provided to the individual. The Court has never acknowledged that it may be inconsistent to apply double jeopardy protection to the corporation in exactly the same manner as it does to the individual, when the Fifth Amendment's Self-Incrimination and Indictment Clauses provide no protection to a corporate defendant. That uncritical acceptance of the applicability of the Double Jeopardy Clause to the corporation overlooks the differences between corporate and individual defendants, distinctions that are central to the Court's own analysis of why the double jeopardy protection prohibits a second trial to avoid the personal harm that a second prosecution can engender. While corporations should receive much of the protection provided by the Double Jeopardy Clause, they, unlike the individual, should not obtain the windfall of a plainly erroneous acquittal because the potential harm to the corporation from an appeal of that verdict may not outweigh the need to protect the government's power to enforce the criminal law.

by way of an indictment. *But see* Jung, *supra* note 310, at 500 (arguing that conviction of a corporation can visit infamy through negative publicity). An expansive theory of what constitutes an infamous crime, based on the ephemeral effects an indictment may have on a corporation, would require substantial alterations to Supreme Court holdings that define "infamous crimes" to accommodate corporate defendants. The effect of such an enlargement of the Indictment Clause would be either to lower the threshold for triggering the right so that it would cover virtually every federal crime, or to create a special rule to extend the protection *only* to corporations. The latter approach would give the corporation greater protection than individual defendants receive, a result that is not supported by the Court's analysis of the Self-Incrimination Clause and Fourth Amendment for corporate defendants.

322. See *Yellow Freight*, 637 F.2d at 1255 (denying motion to dismiss on Indictment Clause claim); *Armored Transport*, 629 F.2d at 1320 (stating that indictment was valid).

VI. AFTER THE CHARGE: THE CRIMINAL CONSTITUTIONAL RIGHTS
OF CORPORATIONS UNDER THE SIXTH AMENDMENT

The Supreme Court has confronted constitutional claims by corporate defendants under the Fourth and Fifth Amendments, and its analysis of the scope of those rights is not a model of Socratic clarity. Nevertheless, the Court has had much greater opportunity to consider those rights than the Sixth Amendment protections that are applicable in the later stages of a criminal prosecution. Most criminal cases involve guilty pleas rather than trials,³²³ and corporations recently have been given an additional strong incentive to cooperate with the government under the Federal Sentencing Guidelines. A key component of the Guidelines permits the imposition of a reduced fine when a corporation institutes a compliance program for detecting criminal violations and cooperates with the investigating authorities when a crime has occurred.³²⁴

The incentives for corporations to cooperate with the government and settle criminal cases short of trial makes it less likely that issues relating to a corporate defendant's constitutional rights will arise at trial.³²⁵ Never-

323. In accepting the reality of plea bargaining in *Brady v. United States*, 397 U.S. 742 (1970), the Supreme Court as far back as 1970 noted that "well over three-fourths of the criminal convictions in this country rest on pleas of guilty." *Id.* at 752.

324. U.S. SENTENCING COMMISSION GUIDELINES MANUAL § 8A1.2 cmt. 3(k) (1995) (permitting a reduction in corporate fines if organization had an "effective program to prevent and detect violations of law . . . that has been reasonably designed, implemented and enforced so that it generally will be effective in preventing and detecting criminal conduct").

325. The post-trial criminal constitutional protection that can apply to a corporation is the Eighth Amendment guarantee that excessive fines may not be imposed. In its only opportunity to consider the question of the applicability of the Excessive Fines Clause to a corporation, the Court declined to consider the question. *See Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.22 (1989) ("[N]or shall we decide whether the Eighth Amendment protects corporations as well as individuals."). Justice O'Connor argued in a separate opinion that corporations come within the protection of the Eighth Amendment: "If a corporation is protected by the Due Process Clause from overbearing and oppressive monetary sanctions, it is also protected from such penalties by the Excessive Fines Clause." *Id.* at 284 (O'Connor, J., concurring and dissenting). Although the majority opinion refused to reach the issue of corporate protection, it did identify the Framers' intent in adopting the Eighth Amendment, that "the primary focus . . . was the potential for governmental abuse of its 'prosecutorial' power, not concern with the extent or purposes of civil damages." *Id.* at 266.

The analysis proposed in this Article for determining the applicability of a criminal constitutional protection to a corporate defendant focuses on weighing the effect of granting the protection on the government's enforcement program with the need to protect against governmental misuse of power. As identified in *Browning-Ferris*, the primary rationale for the Excessive Fines Clause is to protect defendants from prosecutorial abuse, which weighs in favor of granting the protection to corporations. The effect of the Eighth Amendment protection on the government's enforcement power appears to be minimal, because the

theless, there are situations in which a corporate defendant does not settle and instead proceeds to trial. That proceeding raises the question of the applicability of the Sixth Amendment rights to corporations. The principal protections of the Sixth Amendment that raise special issues for corporations are the right to a jury trial, confrontation of witnesses, and the assistance of counsel.³²⁶

provision only prohibits fines which exceed an ill-defined limit, *see* *Austin v. United States*, 113 S. Ct. 2801 (1993) (remanding civil asset forfeiture matter to lower court to determine whether amount of penalty is excessive), but does not restrict the Court's power to punish a corporation for its misconduct. Given the minimal effect that recognition of the Excessive Fines Clause will have on investigating and prosecuting corporate crimes, the Court should acknowledge the right of a corporate defendant to challenge a fine that it considers excessive. *Cf.* *United States v. Pilgrim Mkt. Corp.*, 944 F.2d 14, 22 (1st Cir. 1991) ("We will assume for the purposes of our discussion that the eighth amendment proscription against excessive fines applies to corporations, although this is a very tenuous assumption.").

326. The other Sixth Amendment rights that apply in criminal prosecutions are: speedy and public trial; being informed of the crime charged; and, compulsory process. Each of these rights protects the defendant from government abuse of prosecutorial power. Moreover, each right is unconditional, in that it applies in every criminal proceeding and is not dependent on some threshold being met before the right can be exercised, unlike the Indictment Clause, which requires charging a capital or infamous crime, or the jury trial right, which only applies if the sentence imposed exceeds six months.

The right to a speedy trial is designed "to limit the possibilities that long delay will impair the ability of an accused to defend himself," *Smith v. Hooey*, 393 U.S. 374, 378 (1969) (quoting *United States v. Ewell*, 383 U.S. 116, 120 (1966)), and it applies to all defendants "when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution," *United States v. Marion*, 404 U.S. 307, 313 (1971). Similarly, the right to a public trial applies to all criminal prosecutions, including criminal contempt, and has been described by the Court as "a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *In re Oliver*, 333 U.S. 257, 270 (1948).

The right to be informed of the charges and to have compulsory process are closely related to the guarantee of due process provided by the Fifth and Fourteenth Amendments. *See* *LAFAVE & ISRAEL*, *supra* note 22, § 24.3, at 1016 (early cases on right of access to evidence relied on due process analysis, and subsequent cases have built on that approach). These rights also provide every defendant with a fair description of the charges and access to evidence against the defendant, including evidence held by the government. The Court has long recognized that due process applies to corporations. *See* *Pembina Consol. Silver Mining and Milling Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888). Fundamental fairness, the touchstone of due process, requires that every defendant be accorded the right to receive adequate notice of the crime charged and to mount a defense. *See* *Taylor v. Illinois*, 484 U.S. 400, 408 (1988) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense. Indeed, this right is an essential attribute of the adversary system itself.") (citation omitted); *Hamling v. United States*, 418 U.S. 87, 117 (1974) (the charging document "is sufficient if it, first, contains the elements of the offense charged and

A. Can There Be a Jury of the Corporation's Peers?

Both Article III of the Constitution and the Sixth Amendment provide a seemingly absolute right to a jury trial for every criminal defendant. Article III provides: "The trial of all Crimes . . . shall be by Jury,"³²⁷ and the Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."³²⁸ Yet, the Supreme Court has rejected a categorical requirement that every criminal defendant have the right to demand a jury trial.³²⁹ Instead, the Court has dissected the protection by requiring that the charged offense be "serious" rather than "petty" before the jury right attaches.³³⁰

The traditional demarcation for the right to a jury is whether the maximum sentence that can be imposed for the crime is greater than six months.³³¹ Crimes for which a court can impose a term of imprisonment

fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.").

Applying the analysis proposed in this Article for determining the applicability of a constitutional criminal protection to a corporation, the better approach is to find that these Sixth Amendment rights apply to the corporation because the need to protect defendants far outweighs any potential harm to the government's enforcement program from recognizing the corporation's power to assert them. Indeed, it would shatter the concept of due process, which the Court has held applicable to corporations, to deny a corporation these rights at trial because this would relieve the government of much of its burden to prove guilt beyond a reasonable doubt, which would call into question whether a guilty verdict is reliable.

327. U.S. CONST. art. III, § 2, cl. 3.

328. U.S. CONST. amend. VI.

329. See *Callan v. Wilson*, 127 U.S. 540, 552 (1888) (stating that some petty offenses may be proceeded against summarily without a jury).

330. *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968) ("The penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment."). In determining the scope of the jury trial right, as early as 1888 the Court in *Callan v. Wilson*, 127 U.S. 540 (1888), asserted that the Constitution incorporates the common law distinction between serious and petty offenses: "[T]here are certain minor or petty offences that may be proceeded against summarily, and without a jury . . ." *Id.* at 552. See Alan L. Adlestein, *A Corporation's Right to a Jury Trial Under the Sixth Amendment*, 27 U.C. DAVIS L. REV. 375, 388-92 (1994) (reviewing the history of common law distinction between serious and petty offenses).

331. See *Baldwin v. New York*, 399 U.S. 66, 69 (1970) (plurality opinion) (maximum penalty of one year triggers jury trial right); *Duncan*, 391 U.S. at 162 (maximum penalty of two years triggers jury trial right); *District of Columbia v. Clawans*, 300 U.S. 617, 626-27 (1937) (no right to jury trial when maximum sentence is 90 days); see generally *24th Criminal Procedure Project*, *supra* note 234, at 1106-11 (reviewing scope of jury trial right). The Court noted in *Duncan* that the dividing line between serious and petty crimes had been "ill-defined, if not ambulatory." *Duncan*, 391 U.S. at 160.

of less than six months are presumptively "petty" for resolving a constitutional claim for a jury trial.³³² The Court has acknowledged, however, that the jury trial right may be invoked if a defendant "can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one."³³³

The corporation's power to claim the constitutional jury trial right would seem to be foreclosed, similar to the Indictment Clause protection, by the bright-line test that the term of imprisonment creates a presumption of whether a crime is serious or petty.³³⁴ Corporations can be fined or sentenced to a term of probation, but they cannot be incarcerated.³³⁵ Yet, in *United Mine Workers of America v. Bagwell*,³³⁶ the Supreme Court recognized that a labor union could assert the jury trial right in a criminal contempt prosecution.³³⁷

Despite the seemingly clear distinction between serious and petty offenses, *Bagwell's* recognition of a corporate jury trial right in criminal contempt proceedings is not as anomalous as it first appears because of the

332. *United States v. Nachtigal*, 507 U.S. 1, 4 (1993) (per curiam). The designation of an offense as "petty" depends on the maximum penalty a court could impose without regard to the number of charges against a defendant that can be brought in a single proceeding. *Lewis v. United States*, 116 S. Ct. 2163, 2167 (1996).

333. *Blanton v. City of North Las Vegas*, 489 U.S. 538, 543 (1989).

334. *See Green v. United States*, 356 U.S. 165, 187 (1958) (noting that trial by jury and indictment by grand jury "possess a unique character under the Constitution" that allows the Court to find that they are not required in criminal contempt proceedings).

335. In an interesting attempt to sentence a corporation to what would effectively constitute a term of imprisonment, a district court judge ordered the United States Marshall to seize a corporation's assets and monitor its business activities for a period of time as punishment for the corporation's involvement in a price-fixing scheme. *See United States v. Allegheny Bottling Co.*, 695 F. Supp. 856 (E.D. Va. 1988), *aff'd in part, rev'd in part*, 870 F.2d 655 (4th Cir. 1989). The circuit court reversed this novel sentence for the corporation. *United States v. Allegheny Bottling Co.*, 870 F.2d 655 (4th Cir. 1989).

336. 114 S. Ct. 2552 (1994).

337. *Id.* at 2562. *See United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 665 (2d Cir. 1989) ("We conclude that the jury right is available for criminal contempt whenever the fine imposed on an organization exceeds \$100,000."), *cert. denied*, 493 U.S. 1021 (1990); *United States v. Troxler Hosiery Co.*, 681 F.2d 934, 937 (4th Cir. 1982) (finding no constitutional violation in refusing a jury trial when fine imposed does not constitute a serious deprivation to the corporate defendant); *United States v. R.L. Polk & Co.*, 438 F.2d 377, 379 (6th Cir. 1971) ("fundamental principle that corporations enjoy the same rights as individuals to [a] trial by jury"); *United States v. NYNEX Corp.*, 781 F. Supp. 19, 28 (D.D.C. 1991) (jury trial right of corporation attaches after weighing size of fine with firm's ability to pay to determine whether punishment is serious), *rev'd on other grounds*, 8 F.3d 52 (D.C. Cir. 1993); *cf. Musidor, B.V. v. Great Am. Screen*, 658 F.2d 60, 66 (2d Cir. 1981) (holding that the corporation was not deprived of a constitutional right when it was fined \$10,000 and when it never requested a jury trial), *cert. denied*, 455 U.S. 944 (1982).

context of the case.³³⁸ The Court has described criminal contempt as “*sui generis*,”³³⁹ and *Bagwell*’s holding comports with the analysis proposed in this Article that the scope of a corporation’s criminal constitutional rights involves weighing the effect of recognizing the needs of the government’s enforcement effort against the need to protect against misuse of the government’s power. In fact, criminal contempt proceedings present a special case that requires courts to recognize a limited corporate right to a jury trial, but the constitutional protection should not be understood as applicable to every prosecution of a corporation. The prospect of a jury of the defendant’s peers may seem peculiar when applied to a corporation, but the need to guard against the potential abuse of the contempt power supports extending the protection to the corporate defendant in this limited context.

1. The Tortured Development of the Jury Trial Right in Criminal Contempt Proceedings

Courts have long exercised the power to punish contumacious³⁴⁰ conduct to vindicate the court’s dignity and authority, and the judge is often involved in initiating the contempt proceedings.³⁴¹ Contemptuous acts fall into two categories: direct contempts, which occur in the judge’s presence, for which punishment may be imposed without any form of trial, and indirect contempts, which are acts “committed outside the presence of the court for which some fact-finding process is concededly necessary.”³⁴²

A second form of categorization involves the civil/criminal distinction in contempt law. Punitive sanctions for past conduct are prosecuted as criminal actions, while the Court designates as civil proceedings coercive sanctions designed to compel compliance with a judicial order or to compensate another party for losses resulting from the contemptuous

338. See Earl C. Dudley, Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempt*, 79 VA. L. REV. 1025, 1025 (1993) (“The literature on contempt of court is unanimous on one point: the law is a mess.”). Professor Dudley’s article provides an excellent review of the development (such as it is) of the law of criminal contempt prior to the Court’s decision in *Bagwell*.

339. *Myers v. United States*, 264 U.S. 95, 103 (1924) (explaining that contempt proceedings are “*sui generis*—neither civil actions nor prosecutions for offenses, within the ordinary meaning of those terms”).

340. “[O]bstinately disobedient or rebellious; insubordinate.” THE AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 410 (3d ed. 1992).

341. See *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 795-800 (1987) (reviewing history of contempt power).

342. Dudley, *supra* note 338, at 1030. The Supreme Court limited the lower court’s summary contempt power to only those acts that the judge has personally witnessed. *Johnson v. Mississippi*, 403 U.S. 212, 215 (1971) (per curiam). A federal court’s power to punish both forms of contempt is codified at 18 U.S.C. § 401 (1988).

behavior.³⁴³ If the Court labels the contempt "criminal," then it affords the defendant the constitutional protections of double jeopardy,³⁴⁴ assistance of counsel,³⁴⁵ and the privilege against self-incrimination.³⁴⁶

The fundamental problem with the application of the judicial contempt power is that there are very few real constraints on the trial court's power to impose punishment upon a finding of a violation because neither statutes nor regulations prescribe the applicable sanctions.³⁴⁷ The conflicting roles of the judge as the victim of the illegal acts, the finder of facts, and the authority who metes out the punishment exacerbates the problem. That predicament "often strikes at the most vulnerable and human qualities of a judge's temperament. Even when the contempt is not a direct insult to the court or the judge, it frequently represents a rejection of judicial authority"³⁴⁸

One means by which the Supreme Court has sought to constrain judicial discretion was by expanding the category of contempts that should be designated as criminal, thereby requiring courts to provide a range of constitutionally mandated procedures to temper the pernicious impact of the judge's "human qualities."³⁴⁹ The other principal means that the Court has used to temper the power of trial courts was to limit their power to use summary contempt proceedings to impose criminal punishments, a limitation the Court fashioned in the 1960s.

In *United States v. Barnett*,³⁵⁰ the Court upheld a criminal contempt finding against Mississippi's governor and lieutenant governor arising out of their defiance of an order requiring the admission of James Meredith to the University of Mississippi.³⁵¹ The defendants demanded a jury trial,³⁵² which historically had been denied in criminal contempt proceedings.³⁵³ Given the highly charged emotions triggered by desegregation

343. See *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 631-32 (1988); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441-45 (1911).

344. *In re Bradley*, 318 U.S. 50, 52 (1943).

345. *Cooke v. United States*, 267 U.S. 517, 537 (1925).

346. *Gompers*, 221 U.S. at 444.

347. *Dudley*, *supra* note 338, at 1026-27 ("Neither 18 U.S.C. § 401 (1988) nor any other federal statute limits the severity of sanctions that a court may impose in contempt. . . . Civil contempt sanctions can also be breathtakingly severe.").

348. *Bloom v. Illinois*, 391 U.S. 194, 202 (1968); see *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787, 822 (1987) (Scalia, J., concurring) (Contempt power "summons forth . . . the prospect of 'the most tyrannical licentiousness.'" (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 228 (1821))).

349. *Dudley*, *supra* note 338, at 1031-33.

350. 376 U.S. 681 (1964).

351. *Id.* at 683.

352. *Id.* at 682-83.

353. The denial of a jury trial right in contempt proceedings can be traced to Blackstone. See 4 WILLIAM BLACKSTONE, COMMENTARIES *286-87 (1803). The Supreme

orders, recognition of the right to a jury trial in this proceeding would likely have resulted in an acquittal, thereby permitting elected state officials to continue their obstruction of federal authority. In light of this situation, a narrow five-justice majority opinion undertook an elaborate historical defense of the denial of the jury trial right in criminal contempt proceedings to support the conclusion that "[i]t has always been the law of the land, both state and federal, that the courts—except where specifically precluded by statute—have the power to proceed summarily in contempt matters."³⁵⁴

Two years after *Barnett*, in *Cheff v. Schnackenberg*,³⁵⁵ the Court began to transform its position on criminal contempt through an exercise of its supervisory power. *Cheff* imposed a rule on federal courts that a criminal contempt in which the judge imposed a sentence of over six months requires a trial by jury, adopting the same rule for criminal contempt that had been developed for trials of substantive offenses.³⁵⁶

Only two years after *Cheff*, the Court announced a broader change in the Sixth Amendment right to a jury trial in the companion cases of *Duncan v. Louisiana*³⁵⁷ and *Bloom v. Illinois*.³⁵⁸ In *Duncan*, the Court held that the Fourteenth Amendment required a right to trial by jury in state prosecutions if the defendant could have invoked the jury trial protection in a federal court.³⁵⁹ The Court justified this holding by identifying the two purposes

Court stated at one point that "a long and unbroken line of decisions involving contempts . . . establish beyond peradventure that criminal contempts are not subject to jury trial as a matter of constitutional right." *Green v. United States*, 356 U.S. 165, 183 (1958). The court also noted that a defendant in a contempt proceeding may not assert the right to require indictment by a grand jury. *Id.* at 184.

354. *Barnett*, 376 U.S. at 692. Justice Black's dissent argues against even recognizing that federal courts have the contempt power "in the absence of a clear and unequivocal congressional grant," *id.* at 724 (Black, J., dissenting), while Justice Goldberg's dissent argues that the punishment for a criminal contempt "can no longer be deemed a species of petty offense punishable by trivial penalties," and therefore the jury trial right attaches. *Id.* at 752 (Goldberg, J., dissenting).

355. 384 U.S. 373 (1966).

356. *Id.* at 380. The Court announced that criminal contempt was not automatically a serious offense, and therefore the actual sentence imposed, not the potential sentence, determined whether the proceeding involved a serious or petty offense. *Id.* The individual defendant's sentence was 6 months, which permitted the Court to conclude that the jury trial right did not attach because it was a petty offense under *District of Columbia v. Clawans*. *Id.* (citation omitted). The corporate defendant was fined \$100,000, and the Court had denied its petition for a writ of certiorari. *Id.* at 375.

357. 391 U.S. 145 (1968).

358. 391 U.S. 194 (1968).

359. *Duncan*, 391 U.S. at 149. *Duncan* was an important case in establishing that the doctrine of selective incorporation of the Bill of Rights involved determining whether a constitutional guarantee was fundamental "in the context of the criminal processes maintained by the American States." *Id.* at 150 n.14. See LAFAYE & ISRAEL, *supra* note 22, at § 2.6(a) (reviewing the development of selective incorporation doctrine).

of the jury trial right: first, it prevents "oppression by the Government"; and, second, it gives defendants "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."³⁶⁰ In *Bloom*, the Court relied on *Duncan* to hold that a state criminal contempt proceeding in which the sentence imposed exceeded six months required a jury trial.³⁶¹ The Court explained that the right to a trial by jury was fundamental because there was "no substantial difference between serious contempts and other serious crimes."³⁶² *Bloom* asserted that the right to a jury trial in a serious criminal contempt proceeding overcame "the unwisdom of vesting the judiciary with completely untrammelled power . . . and makes clear the need for effective safeguards against that power's abuse."³⁶³

The question of whether a corporate entity can claim the jury trial right was first raised in the Supreme Court in *Muniz v. Hoffman*.³⁶⁴ The case arose from an injunction issued in a labor strike, and the district court found the labor union in contempt for various violations and fined it \$10,000.³⁶⁵ Much like its approach to a corporate defendant's claim to protection under the Double Jeopardy Clause in *Fong Foo* and *Martin Linen Supply*, the Court's opinion did not discuss whether a corporation could even assert the jury trial right in a criminal contempt proceeding. It simply assumed that the right applied and went on to reach the constitutional issue of the scope of the protection.³⁶⁶

The Court explained in *Muniz* that it "has as yet not addressed the question whether and in what circumstances, if at all, the imposition of a fine for criminal contempt, unaccompanied by imprisonment, may require a jury trial."³⁶⁷ The Court then refused to resolve the issue of whether a

360. *Duncan*, at 155-56. *Duncan* involved a politically charged racial incident, similar to that facing the Court in *Barnett*. In *Duncan*, a black defendant was sentenced to sixty days in jail and a \$150 fine for allegedly slapping on the elbow, although apparently not injuring, a white person, during a period of racial tension related to the desegregation of a local high school. *Id.* at 146-47.

361. *Bloom*, 391 U.S. at 211 ("Under the rule in *Cheff*, when the legislature has not expressed a judgment as to the seriousness of an offense by fixing a maximum penalty which may be imposed, we are to look to the penalty actually imposed as the best evidence of the seriousness of the offense.").

362. *Id.* at 202.

363. *Id.* at 207.

364. 422 U.S. 454 (1975).

365. *Id.* at 457. Much of the opinion dealt with the union's statutory right to a jury trial under 18 U.S.C. § 3692 (1988).

366. See *supra* text accompanying notes 250-61. The Court in *Muniz* merely asserted that the defendant union was not "deprived of *whatever* right to jury trial it might have under the Sixth Amendment," failing to consider if the union even had such a right. *Muniz*, 422 U.S. at 477 (emphasis added).

367. *Id.* at 476. The federal code defined a petty offense as that which imposed a

fine alone can be "serious" for the purpose of permitting a defendant to invoke the jury trial right.³⁶⁸ Thus, the Court in *Muniz* asserted that a \$10,000 fine against a union with 13,000 members was not "of such magnitude that a jury should have been interposed to guard against bias or mistake."³⁶⁹

2. *Bagwell* and The Organizational Right to a Jury Trial in Criminal Contempt Proceedings

In *United Mine Workers v. Bagwell*,³⁷⁰ the Court did answer the question of whether a fine can ever be so severe that it constitutes a "serious" offense triggering the jury trial right. During a bitter coal miners strike in Virginia, a state court judge imposed over \$64 million in fines against the union for repeated violations of an injunction.³⁷¹ Once the strike settled, the court vacated \$12 million of the fine but appointed a Special Commissioner to collect the remaining \$52 million on behalf of the state.³⁷² After determining that the contempt resulted in a criminal sanction,³⁷³ the Court held that the union was entitled to a jury trial under the Sixth Amendment.³⁷⁴

The Court's analysis of the corporation's jury trial right was as conclusory as the rejection of the defendant union's claim in *Muniz*. *Bagwell* merely stated in a footnote that it "need not answer today the difficult question where the line between petty and serious contempt fines should be drawn, since a \$52,000,000 fine unquestionably is a serious

penalty of imprisonment for six months or less or a fine of not more than \$500, but the court of appeals accorded that statutory definition "no talismanic significance." *Id.* at 477. The provision defining federal offenses as felonies or misdemeanors was 18 U.S.C. § 1, which Congress repealed in 1984, effective November 1, 1987. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 1984 U.S.C.C.A.N. (98 Stat.) 1976, 2027. Instead, the Court stated that "imprisonment and fines are intrinsically different . . . it is not tenable to argue that the possibility of a \$501 fine would be considered a serious risk to a large corporation or labor union." *Muniz*, 422 U.S. at 477.

368. *Id.*

369. *Id.*

370. 114 S. Ct. 2552 (1994).

371. *Id.* at 2556.

372. *Id.* The state courts held that the fines were coercive civil fines and not criminal penalties. *Id.*

373. *Id.* at 2560-61 ("Contempts involving out-of-court disobedience to complex injunctions often require elaborate and reliable factfinding. . . . Under these circumstances, criminal procedural protections such as the rights to counsel and proof beyond a reasonable doubt are both necessary and appropriate to protect the due process rights of parties and prevent the arbitrary exercise of judicial power.").

374. *Id.* at 2563.

contempt sanction.”³⁷⁵ The margin between “petty” and “serious” fines left after *Bagwell* and *Muniz* is indeed broad, totaling \$51,990,000.³⁷⁶

Regardless of the line-drawing problem, however, *Bagwell* and *Muniz* at least held clearly that an organization which could not be imprisoned may be able to assert the constitutional jury trial right in a criminal contempt proceeding. It does not follow, however, that those decisions grant corporations an unconditional right under Article III and the Sixth Amendment to demand a jury trial in every criminal prosecution in which a potentially large fine can be imposed. Transferring the holdings of *Bagwell* and *Muniz* from the sui generis context of criminal contempt proceedings to prosecutions for substantive criminal offenses misreads the special circumstances present in contempt proceedings.

The danger inherent in a criminal contempt proceeding is the potential misuse of the government’s power by a judge who is “solely responsible for

375. *Id.* at 2562 n.5.

376. The United States Court of Appeals for the Second Circuit tried to draw such a line in *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656 (2d Cir. 1989), a case decided before *Bagwell* involving a contempt prosecution for violation of an antitrust consent decree. The Second Circuit rejected as too minimal anything under a \$10,000 fine, which is the congressional designation of the maximum monetary penalty for a misdemeanor, but declined to adopt the statutory maximum fine of \$500,000 for a corporate felony conviction as the trigger for the jury trial right because applying an amount that high is “unwarranted.” *Id.* at 665. Instead, the circuit court adopted \$100,000 as the “appropriate threshold for determining an organization’s right to a jury trial.” *Id.* The Second Circuit acknowledged that its line is arbitrary, but it sees the \$100,000 figure as providing concrete guidance that avoids imposing on trial courts the time-consuming task of determining the effect a particular fine might have on an organization before the court even begins consideration of the alleged contemptuous acts. *Id.* at 664. Professor Adlestein criticizes the Second Circuit’s approach as a creation “out of whole cloth.” Adlestein, *supra* note 330, at 435.

The United States District Court for the District of Columbia reached a different result in *United States v. NYNEX Corp.*, 781 F. Supp. 19 (D.D.C. 1991), *rev’d on other grounds*, 8 F.3d 52 (D.C. Cir. 1993), a contempt action in which the government announced it would seek a \$1 million fine upon conviction. The district court explained that the constitutional protection was only available after weighing the potential fine against a corporation’s ability to pay to determine whether it was a serious sanction. *Id.* at 27. It then held that the fine, which represented only 0.1% of the defendant corporation’s annual net income, was not a serious risk, and therefore the jury trial right did not apply. *Id.* at 28. The district court questioned the *Twentieth-CenturyFox* test for the Sixth Amendment right because it benefits larger firms who will not be negatively affected by a \$100,000 fine while smaller firms can be devastated by any sanction close to that amount. *Id.* at 28 n.12.

The United States Court of Appeals for the Fourth Circuit took an approach similar to *NYNEX* in *United States v. Troxler Hosiery Co.*, 681 F.2d 934 (4th Cir. 1982), holding that any fine it could impose in a criminal contempt proceeding without a jury was “limited . . . only to the extent that it is of such magnitude as to constitute a serious deprivation.” *Id.* at 937.

identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct."³⁷⁷ The risk posed in this situation has led the Supreme Court to grant the defendant a broad array of procedural protections, one of the most important of which is to interpose a jury as the factfinder to mitigate the negative effect of the judge's immersion in the process. In fact, the Court has stated that "in contempt cases an even more compelling argument can be made for providing a right to jury trial as a protection against the arbitrary exercise of official power."³⁷⁸

It was the structural danger posed by the nature of criminal contempt proceedings, not just that the sanction could be labeled criminal, which led the Court in *Bagwell* to find that the \$52 million fine constituted a "serious" offense. The amount of the fine alone arguably was not the determining factor, because the setting in which the sanction arose made the potential for misuse of the government's authority a substantial possibility. As the Court in *Bagwell* declared, the fine was "unquestionably . . . a serious contempt sanction."³⁷⁹ That language suggests that an unusually large fine should not, by itself, trigger the jury trial right. In an emotionally charged atmosphere, such as a bitter labor strike involving the dominant local industry,³⁸⁰ the possibility that ruinous fines may be imposed without any community participation in the process to serve as a buffer between the participants, reeks of the worst form of oppression. For the *Bagwell* Court to come to a different conclusion would have been surprising. The enormous fine imposed on the union, much like a prison sentence of more than 6 months for contumacious conduct, suggests judicial vindictiveness.

The difficulty with *Bagwell* as a precedent for transporting the right to a jury trial to all cases in which a corporate defendant faces a significant fine is that the danger of misuse of the government's power is not present to the same degree in a regular criminal prosecution as it is in a contempt proceeding.³⁸¹ The neutrality of the court is usually not called into

377. *Bagwell*, 114 S. Ct. at 2559.

378. *Bloom*, 391 U.S. at 202.

379. *Bagwell*, 114 S. Ct. at 2562 n.5 (emphasis added). The Court took a similarly narrow approach to the question of whether a fine can trigger the right in *Muniz*, when it stated that it was not addressing the issue of whether "a fine for *criminal contempt*, unaccompanied by imprisonment, may require a jury trial if demanded by the defendant." 422 U.S. at 476 (emphasis added).

380. See *Controlling Coalfield Violence*, THE VIRGINIAN-PILOT, July 6, 1994, at A12 ("Five years ago at this time, the coalfields of southwest Virginia seemed as dangerous as a Beirut street corner.").

381. The line-drawing exercises in *Twentieth Century Fox* and *NYNEX* to determine the size of the sanction that triggers a corporation's jury trial right are subject to misinterpretation because the cases consider the determination of the seriousness of the fine apart from the potential misuse of power in the contempt proceeding. Simply asserting that any \$100,000 fine enables a corporation to assert the jury trial right without recognizing that the seriousness of the sanction is also a function of preventing a court from misusing its power

question in prosecutions for substantive offenses, so the potential for abuse is significantly lower.³⁸² The trial court's role is to evaluate the evidence of both parties, rather than seeking vindication of its own power and dignity against one party.

The test of whether a corporation can assert a criminal constitutional right should involve weighing the extent to which exercise of the right will undermine the government's enforcement program with whether the right will protect a corporation against a significant misuse of the government's power. The potential for judicial abuse in criminal contempt actions argues strongly in favor of granting the corporation a jury trial right in such a proceeding when it is faced with a substantial fine. The negative effect on protecting the power and dignity of the court in contempt proceedings by permitting a corporation to assert the right to a jury trial is likely to be minimal when the judge determines that a significant sanction will be imposed upon conviction.

Recognizing any broader right to a jury trial outside of contempt proceedings, however, would extend the constitutional protection in a way that could unduly undermine law enforcement efforts. Corporations and individuals are subject to substantial penalties in administrative and civil proceedings.³⁸³ But the Supreme Court has clearly held that there is no Seventh Amendment right to a civil jury trial for adjudication of "'public rights,' e.g., where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights."³⁸⁴ Even when the jury right attaches in a civil proceeding by the government

turns the corporate right into a mindless arithmetic procedure. Divorced from the context of criminal contempt proceedings, the use of a dollar figure to determine the corporate jury trial right may mean that virtually every prosecution of a corporation for a federal offense will come under the Sixth Amendment because the maximum authorized fine for almost all federal crimes is \$500,000. See 18 U.S.C. § 3571(c)(3) (1988).

382. The appellate courts review allegations of bias by the trial court under the abuse of discretion standard to determine whether the judge evinced any prejudice against a defendant that tainted the proceeding. If there is a possibility that the judge's conduct substantially affected the outcome of the trial, then the conviction is reversed and a new trial ordered. See, e.g., *United States v. Van Dyke*, 14 F.3d 415, 422, 424 (8th Cir. 1994) (indicating judicial bias against the defendant through the hostile tone of trial judge's question to defendant and court's limitation on the permissible scope of testimony by defendant's expert, requiring reversal of the conviction).

383. Among the sanctions that the government can seek in a civil proceeding are monetary penalties. See, e.g., 15 U.S.C. § 78U-1(a) (1988) (triple penalty for insider trading profits); 21 U.S.C. § 881 (1988) (civil forfeiture of property used in drug activity); 42 U.S.C. § 1320a-7(b)(1) (1988) (exclusion from governmental programs); see generally Project, *The Decriminalization of Administrative Law Penalties*, 45 ADMIN. L. REV. 367, 387-92 (1993).

384. *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 458 (1977).

for a statutory violation, the Seventh Amendment does not mandate the assessment of an authorized civil penalty by a jury.³⁸⁵

In *United States v. Halper*³⁸⁶ and *Austin v. United States*,³⁸⁷ the Supreme Court held that the Double Jeopardy Clause of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment apply to civil penalties that are punitive and not just remedial in nature.³⁸⁸ If a substantial fine imposed in a civil proceeding may constitute a punishment for constitutional purposes, then a logical argument can be made that the fine is "serious" for the purpose of allowing a corporation to assert the jury trial right.

Such a simplistic approach to triggering the jury trial right, based solely on the size of the fine, arguably means that a large number of civil enforcement actions could not be pursued except through the more elaborate, and time-consuming, method of a full-scale criminal jury trial. The opportunity to conclude the case through summary judgment might not be available if the corporate defendant has the right under Article III and the Sixth Amendment to have the case adjudicated by a jury. Granting corporations such broad protection solely on the basis of the potential size of a fine may impose a disproportionate cost, especially when compared to the minimal danger that the government will misuse its power in a substantive criminal proceeding if there is not a right to a jury trial. Unlike contempt proceedings, the judge in a regular criminal prosecution or a civil enforcement action is not a potentially biased or aggrieved participant. Therefore, the possibility of governmental abuse of its authority is absent.³⁸⁹

Corporations may even argue in federal prosecutions that they do not have the right to a jury trial because the corporate defendant may be able to have the court conduct a bench trial. In *Singer v. United States*,³⁹⁰ the Supreme Court upheld the constitutionality of Federal Rule of Criminal Procedure 23(a),³⁹¹ which mandates that the government consent to a non-

385. *Tull v. United States*, 481 U.S. 412, 425-26 (1987).

386. 490 U.S. 435 (1989).

387. 113 S. Ct. 2801 (1993).

388. *Halper*, 490 U.S. at 448 ("Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment."); *Austin*, 113 S. Ct. at 2810 (Civil asset forfeiture "serves, at least in part, to punish the owner.").

389. See Adlestein, *supra* note 330, at 442 (Stating that if large penalties are imposed on corporations in civil and administrative proceedings, "then what difference, of a constitutional dimension, arises if that same punishment is imposed in a criminal trial conducted with expansive criminal procedural rules (including proof beyond reasonable doubt and presumption of innocence) but without a right to a jury under the Sixth Amendment?").

390. 380 U.S. 24 (1965).

391. *Id.* at 36 ("We find no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge . . .").

jury trial for “[c]ases required to be tried by a jury.”³⁹² Under *Singer*, a prosecutor’s objection to the waiver of a jury controlled unless “the Government’s insistence on trial by jury would result in the denial to a defendant of an impartial trial.”³⁹³ If corporations do not have the jury trial right outside of criminal contempt proceedings, then the trial court should be able to conduct a bench trial over the government’s objection without requiring the corporate defendant to meet the high threshold of proving that a jury could not render an impartial verdict.³⁹⁴ A bench trial can be an advantageous method of trying the case for a corporate defendant when, as frequently occurs, the alleged violation involves a complicated statute and the question of criminal liability hinges on subtle distinctions about what constitutes wrongful conduct. A district judge or magistrate may be better able than a jury to consider the nature of sophisticated financial transactions or the limitations of corporate control of an agent’s actions.

Bagwell created a limited jury trial right for corporations in criminal contempt proceedings in those situations where the fine imposed can be termed “serious” in order to limit the potential for mistreatment by the judge.³⁹⁵ Outside that context, the Supreme Court’s benchmark for every criminal defendant’s jury trial right is the maximum period of incarceration: “Indeed, because incarceration is an ‘intrinsically different’ form of punishment . . . it is the most powerful indication of whether an offense is ‘serious.’”³⁹⁶ The corporation’s inability to suffer incarceration means that, much like the constitutional minimum for invoking the right to indictment by the grand jury, corporate defendants cannot claim the right to be tried before a jury under Article III and the Sixth Amendment except in criminal contempt proceedings.³⁹⁷

392. FED. R. CRIM. P. 23(a).

393. *Singer*, 380 U.S. at 37.

394. See *United States v. Braunstein*, 474 F. Supp. 1, 13-14 (D.N.J. 1979) (ordering a bench trial over the government’s objection in Medicaid and tax fraud prosecution due to complexity of the issues); *United States v. Panteleakis*, 422 F. Supp. 247 (D.R.I. 1976) (ordering a bench trial over the government’s objection in Medicare fraud trial due to complexity of the issues).

395. See *supra* text accompanying notes 370-81.

396. *Blanton v. City of North Las Vegas*, 489 U.S. 538, 542 (1989) (quoting *Muniz v. Hoffman*, 422 U.S. 454, 477 (1975)). See *Lewis*, 116 S. Ct. at 2166 (“In evaluating the seriousness of the offense, we place primary emphasis on the maximum prison term authorized).

397. See *Adlestein*, *supra* note 330, at 452 (“This entire line of jury right cases, as developed over 100 years, does not support the constitutional principle that any defendant—natural or corporate—subject only to a criminal fine must be tried by jury. Such a principle should not be judicially created now.”). When the government charges officers or employees along with the corporation in the same case, then the individual will usually be able to assert the right to a jury trial. In that instance, it is unlikely the government will seek to sever the trials solely in order to prevent the corporation from being tried in front of a jury. In fact,

B. Can a Corporation Confront Itself?

The Sixth Amendment provides the defendant with the right "to be confronted with the witnesses against him."³⁹⁸ The Supreme Court has held that the Confrontation Clause facilitates the truth-seeking function of a trial that subjects the government's evidence to "rigorous testing" by ensuring the defendant's right to cross-examine witnesses who testify.³⁹⁹ The problem faced by corporations is that the evidence against them often is not the product of direct testimony of witnesses, but of out-of-court statements by corporate agents. The key pieces of proof in most corporate prosecutions are documents generated by the business organization itself and statements of corporate agents that can show their knowledge, which the law attributes to the corporation. Because the primary evidence against a corporation is frequently its own documents and agents, a corporate defendant may be unable to cross-examine in any meaningful way the witnesses who will convict it.

Traditional criminal law requires that the government prove beyond a reasonable doubt that the defendant acted with the requisite intent or *mens rea*, such as knowledge or willfulness, for the charged offense. But under the *respondeat superior* theory of liability adopted in *New York Central*,⁴⁰⁰ the corporation is liable for the acts of its agents that are conducted for the benefit of the corporation. That theory imputes the intent of the individual agent to the corporation, so there is no need to prove that the organization itself intended to commit the crime, only that one acting on its behalf had the requisite intent. Courts have extended *respondeat superior* to permit a conviction where no single agent of the corporation has the necessary intent individually, but by aggregating the knowledge of all of its agents, the corporation can have the requisite "collective knowledge" for the crime.⁴⁰¹

The Confrontation Clause problem facing a corporate defendant is not that the entity cannot assert the constitutional protection. Rather, the entire body of evidence introduced to prove its guilt may consist of out-of-court statements, both documentary and testimonial, recounted by witnesses who are not themselves employees of the corporation or who do not have direct

there are strong strategic reasons why the government would want to have a single trial of all defendants, corporate and individual.

398. U.S. CONST. amend VI.

399. *Maryland v. Craig*, 497 U.S. 836, 845-46 (1990).

400. 212 U.S. 481 (1909).

401. See *United States v. Bank of New England*, 821 F.2d 844, 856 (1st Cir. 1987); *United States v. T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730, 738-39 (W.D. Va. 1974); Martin J. Weinstein & Patricia B. Ball, *Criminal Law's Greatest Mystery Thriller: Corporate Guilt Through Collective Knowledge*, 29 NEW ENG. L. REV. 65, 81 (1994) ("Collectivization of employee conduct by imputing the aggregate of that conduct to the corporation expands the criminal liability of the corporation. In other words, specific intent is imputed to the corporation, even though no individual can be shown to possess the specific intent.").

knowledge of the underlying transaction.⁴⁰² If the prosecutor charged a corporation for making false claims to the government for reimbursement,

402. The government generally introduces proof of the corporation's criminal liability in two ways: first, the business records of the corporation and second, the statements of officers and employees. Each form of evidence can show the knowledge and intent of the agents that is attributable to the corporation, regardless of whether the government prosecutes the individuals. The Federal Rules of Evidence prohibit the admission of hearsay, which is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c). This prohibition is not particularly helpful to corporate defendants in most cases, for three reasons.

First, corporate documents generally constitute business records, which are admissible under Federal Rule of Evidence 803(6) as an exception to the general hearsay prohibition. Rule 803(6) states:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

FED. R. EVID. 803(6).

Second, an admission by a corporate agent is not considered hearsay, even though it is an out-of-court statement offered to prove the truth of the matter asserted, because it comprises a party admission as the "statement by a person authorized by the party to make a statement concerning the subject." FED. R. EVID. 801(d)(2)(C); *see* 2 MCCORMICK ON EVIDENCE § 259, at 158 (4th ed. 1992) ("Even before the adoption of the Federal Rules, the predominant view was to admit a statement by an agent if it concerned a matter within the scope of the declarant's employment and was made before that relationship was terminated.").

Third, the government may also introduce statements of officers and agents against a corporation through the co-conspirator exception to the hearsay rule, which permits the admission of the statement of one conspirator against all other members of the conspiracy. FED. R. EVID. 801(d)(2)(E). Although it may appear incongruous that a corporate agent can engage in a conspiracy with an employing corporation, when that entity can only act through its agents, the Supreme Court has held that an individual and the organization can be prosecuted for an intra-corporate conspiracy. *See* *Nye & Nissen v. United States*, 336 U.S. 613, 614-17 (1949). If the government can introduce sufficient evidence that the employee and the corporation agreed to violate the law, then any statements made by the employee in furtherance of the conspiracy would be admissible against the corporation as the statements of a coconspirator. *See* *Bourjaily v. United States*, 483 U.S. 171, 175, 181 (1987) (government must introduce evidence to permit trial court to find that the conspiracy exists, and court may consider statement as proof of the existence of the conspiracy). This means of admitting evidence can be used when it is unclear whether the corporate agent's actions are on behalf of the corporation, so that they may not meet the admissibility requirements for a party admission.

the case may include the documents submitted to the government for the claim, corporate records showing the true amount owed, and any statements made by corporate employees in connection with the claims.⁴⁰³ The documentary evidence would be admissible as a business record of the corporation, and a records custodian could testify that the company maintained them in the ordinary course of business to meet the requirements of Rule 803(6).

Statements of the employees are admissible against the corporation as admissions of a party-opponent, and the testimony recounting the agents' statements may come from non-employees to whom they spoke, including government agents. If an employee made a particularly incriminating statement, that person might refuse to testify by invoking the self-incrimination privilege. The employee cannot be compelled to testify unless the government grants the person immunity,⁴⁰⁴ and the statements are admissible against the corporation. They are not hearsay and are admissions of an agent acting on behalf of the corporation. Yet, the corporation cannot cross-examine the employee. The corporation can cross-examine the witness who heard the statement, but that questioning only probes the memory of the witness, not the truthfulness or accuracy of the underlying statement. There is no way for the corporation to test the veracity of the declarant of the incriminating statement. That person need not be called as a witness by the government, which seems to violate the basic precept of the Confrontation Clause that the evidence against a defendant be rigorously tested through cross-examination.⁴⁰⁵

403. A prosecution based on these facts most likely can be brought under 18 U.S.C. § 287 (1988), which provides:

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

Id.

404. The defendant's confrontation and compulsory process rights do not override the right of a witness to invoke the privilege against self-incrimination. *See, e.g., United States v. Follin*, 979 F.2d 369, 374 (5th Cir. 1992) (compulsory process right was not violated when the court refused to grant immunity to witness who declined to testify due to possible self-incrimination).

405. A similar problem could arise when the government charges an employee together with the corporation. Statements of the employee are admissible against both parties, yet the corporation could not force the individual defendant to testify in order to subject the statements to cross-examination. Even if there is no evidence of a conspiracy, the usual way that one party's statements are admitted as substantive evidence against another party, the unique position of the corporation bound by its agent's statements means that the corporate defendant could not preclude admission of the statements under the Federal Rules of Evidence.

The Supreme Court has not taken an absolutist approach to the constitutional protection, noting in *Ohio v. Roberts*⁴⁰⁶ that, if read literally, the language of the Confrontation Clause "would require, on objection, the exclusion of any statement made by a declarant not present at trial."⁴⁰⁷ *Roberts* held that admission of hearsay does not violate the Confrontation Clause if the statement bears adequate "indicia of reliability," which in turn "can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception."⁴⁰⁸ The Court explained in *Roberts* that the business records exception is among the hearsay exceptions with "such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'"⁴⁰⁹ Similarly, the coconspirator exception is "firmly rooted" to permit introduction of out-of-court statements by a coconspirator against another defendant without violating that defendant's confrontation right.⁴¹⁰ In short, the Court has held that the declarant need not be unavailable to testify at trial for the court to admit a statement without violating a defendant's Sixth Amendment right, so long as there are sufficient indicia of reliability to overcome any confrontation problem.⁴¹¹

The agency provision of the hearsay rule, which authorizes the admission of out-of-court statements by excluding them from the definition of hearsay, appears to be as equally well grounded as the business records exception and the coconspirator provision. In *United States v. Gooding*,⁴¹² an 1827 Supreme Court decision involving an indictment for illegally

406. 448 U.S. 56 (1980).

407. *Id.* at 63.

408. *Id.* at 66.

409. *Id.* (citation omitted). Interestingly, the Court cited a law review article and not a case for the proposition that the business records exception was firmly rooted. *Id.* A student commentator noted that "[t]he vintage of the exception does not seem to be the most important consideration because the Court mentions in illustration the very reliable business records exception, which is a relative newcomer to the forest of hearsay exceptions." Georgia J. Hinde, Note, *Federal Rule of Evidence 801(d)(2)(E) and the Confrontation Clause: Closing the Window of Admissibility for Coconspirator Hearsay*, 53 *FORDHAM L. REV.* 1291, 1307 (1985).

410. *Bourjaily v. United States*, 483 U.S. 171, 183 (1987).

411. *United States v. Inadi*, 475 U.S. 387 (1986). The Court's holding in *Inadi* was strongly criticized as making the Confrontation Clause a mere adjunct to the hearsay rules:

Thus, the Court has concluded that if a statement does not fall within the traditional definition of hearsay, it does not present a confrontation problem. This means that the sixth amendment contains a hearsay definition. The Court, however, has not struggled to determine the proper definition. Instead, the Court has simply placed the notion of hearsay found in evidence law into the Constitution.

Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 *UCLA L. REV.* 557, 571 (1988).

412. 25 U.S. (12 Wheat.) 460 (1827).

engaging in the slave trade, the defendant challenged the admission of the testimony of a ship's officer as to statements made by an agent of the defendant concerning who would pay the expenses of the voyage.⁴¹³ The Court held that the testimony was admissible on the ground that once the agency relationship was established, then "whatever the agent says within the scope of his authority, the principal says."⁴¹⁴ *Gooding* likely validates the proposition that the agency provision is firmly rooted; therefore, admitting testimony recounting what the corporate agent said would not violate the Confrontation Clause even though the agent need not testify.⁴¹⁵

The problem for the corporation is not that the Constitution excludes it from asserting the confrontation right, but that the legacy of *New York Central* means that it is unlikely to ever raise a Confrontation Clause claim regarding the most important evidence introduced to convict it at trial. A corporation cannot seek to exclude out-of-court statements on Sixth Amendment grounds when those statements are those of a corporate agent or the entity itself embodied by its business records. This approach reflects the holding of *Hale v. Henkel*, that the corporation is separate from its agents and that any constitutional right only applies to the individual supplying the information.⁴¹⁶ The *respondeat superior* theory of liability further exacerbates the corporation's predicament because the statements of its agents may occur at any time, not just when the illegal acts took place. They are admissible against the corporation which does not benefit from the protection provided to individuals.⁴¹⁷

Because of the likely negative effect on the government's enforcement program, the Supreme Court is unlikely to alter its Confrontation Clause analysis to address any corporate concerns about its ability to assert the Confrontation Clause.⁴¹⁸ Excluding, on confrontation grounds, testimony

413. *Id.* at 468-69.

414. *Id.* at 470 (quoting 2 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE *60 (2d ed. 1825)).

415. See Hinde, *supra* note 409, at 1297 n.37 (*Gooding's* statement would be admitted today under the agency provision of Rule 801(d)(2)(D)).

416. *Hale v. Henkel*, 201 U.S. at 75.

417. An employee's statement that a corporation committed certain violations, made long after the occurrence of the illegal activity, can be used at trial against the corporation because it is an admission by a party-opponent, assuming the agent's statement was authorized. Such a confession implicating another individual usually may not be used against the co-defendant in a joint trial. *Bruton v. United States*, 391 U.S. 123, 126 (1968). One way to avoid a *Bruton* problem is to redact any reference to the co-defendant in the statement and instruct the jury to consider the confession only against the confessing defendant. The Court sanctioned this approach in *Richardson v. Marsh*, 481 U.S. 200, 201 (1987). The *Bruton* problem does not arise in corporate prosecutions because the Confrontation Clause is not implicated when out-of-court statements have sufficient indicia of reliability to permit their admission under another exception to the hearsay rules.

418. Proposals to change the means of proving corporate criminal liability that

by third-parties about what an agent said, unless the government calls the agent to testify, could permit a corporation to pressure its employees to refuse to testify or to testify falsely. That possibility might prevent the government from successfully prosecuting corporate violations if it could not show the agent's knowledge and intent through other evidence to prove the corporation's culpability. Similarly, if business records could be excluded under the Confrontation Clause because the creator of the document was not available to testify about the contents of the record, then corporations would have an incentive to obscure the authorship of corporate records to prevent their use against the organization.

The threat that a corporate defendant could use a constitutional provision to frustrate criminal prosecutions was the very issue addressed by the Court in *Hale v. Henkel* in the context of denying the self-incrimination privilege to a corporation. The Court was wary of extending a constitutional right to an organization that "would result in the failure of a large number of cases where the illegal [activity] was determinable only upon the examination of such papers."⁴¹⁹ Any effort to extend confrontation rights that would limit the admission of third-party testimony or documentary proof would have an effect similar to recognizing an organization's right to assert the privilege against self-incrimination.

C. *The Right to Counsel and the Indigent Corporation*

The Sixth Amendment provides that "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."⁴²⁰ The Supreme Court has held that the provision includes "the right to select and be represented by one's preferred attorney," although that right is not unlimited when, for example, the attorney may have a disabling conflict of interest.⁴²¹ The right to counsel extends to defendants who do not have the resources to retain counsel of their choice.⁴²² The Court has limited the constitutional mandate to provide appointed counsel to cases in which actual

incorporate an assessment of the organization's own *mens rea* do not confront the problem of how the corporation's confrontation rights should be accommodated. Professor Bucy notes that proving a "Corporate Ethos" as the basis for criminal liability may create a situation in which "denying a corporation the right to confront its employee on the ground that the corporation and corporate employee share a common identity will be unjust." Bucy, *Corporate Ethos*, *supra* note 21, at 1175. It is not clear, however, how the rules of evidence can be adjusted to limit the potential injustice that can result from having to prove a separate corporate intent without making proof of that intent significantly more difficult.

419. 201 U.S. at 74.

420. U.S. CONST. amend. VI.

421. *Wheat v. United States*, 486 U.S. 153, 159 (1988).

422. See *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (Sixth Amendment right to counsel applies to state proceedings under the Fourteenth Amendment); *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938) (Sixth Amendment right to counsel applies in federal proceedings).

imprisonment is the punishment imposed upon the defendant after conviction.⁴²³

In the vast majority of corporate prosecutions, the organization has sufficient resources to pay for counsel, and it often provides separate counsel for its officers and employees, even at the preliminary stages of an investigation.⁴²⁴ The unusual possibility in which a corporation may be prosecuted when it does not have the assets to retain an attorney will arise in two situations: (1) when it is bankrupt and without enough money to pay an attorney; or (2) when all or part of its assets have been seized by the government, which may prevent it from disbursing its funds.⁴²⁵

423. See *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979) ("We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.").

424. See Henning, *White Collar Crime*, *supra* note 102, at 453 ("At the pre-indictment stage . . . targets of the investigation will often seek separate legal counsel; corporations whose officers are also involved in investigations will frequently provide separate counsel at the company's expense.").

425. The latter situation occurred in *United States v. Unimex, Inc.*, 991 F.2d 546 (9th Cir. 1993), when the government secured an *ex parte* order seizing all of a corporation's \$2 million of assets before trial on drug conspiracy and currency reporting violations. *Id.* at 547. The corporation sought the return of \$100,000 to retain counsel, which the district court denied without holding a hearing. *Id.* The corporation was not represented by counsel at trial when it was convicted along with the company's president. *Id.* at 549. The corporation appealed its conviction on the ground that it had been denied its Sixth Amendment right to counsel at trial. *Id.* The United States Court of Appeals for the Ninth Circuit held that the conviction was unconstitutional because the corporation had been deprived of its Sixth Amendment right. *Id.* at 551. The court's analysis in reaching this conclusion, however, was convoluted at best, and ultimately falls short of the proper analysis of a corporation's right to assistance of counsel.

The Ninth Circuit began by stating: "Being incorporeal, corporations cannot be imprisoned, so they have no constitutional right to appointed counsel." *Id.* at 550. The court reviewed the Criminal Justice Act, 18 U.S.C. § 3006A(a) (1988), which provides for the appointment of counsel for indigent persons who are entitled under the Sixth Amendment or who face the loss of liberty. *Id.* at 549. It found that corporations do not qualify under that provision because they neither have any Sixth Amendment right to counsel nor can they be divested of a liberty interest. *Id.* The circuit court then reversed the conviction on the ground that the pre-trial seizure of the defendant corporation's assets by the district court, without providing an opportunity to contest the freeze order, was unconstitutional:

Unimex's right to counsel under the Sixth Amendment and to Due Process under the Fifth Amendment were violated by taking away all of its assets, denying it an opportunity to show cause prior to its criminal trial that an amount it could have used for attorneys' fees was nonforfeitable, and then forcing it to trial without counsel. *Id.* at 551.

The problem facing the court in *Unimex* was the Supreme Court's holdings in *United States v. Monsanto*, 491 U.S. 600 (1989), and *Caplin & Drysdale v. United States*, 491 U.S.

The Supreme Court's framework for providing counsel to indigent defendants excludes corporations from invoking the right in a manner similar to the denial of protection under the Indictment and Jury Trial Clauses, at least for cases outside of criminal contempt. Under each provision, the punishment a defendant may suffer constitutes the line for determining the scope of protection afforded by the constitutional provision. However, automatically denying a corporation the right to appointed counsel because it cannot be sentenced to a term of imprisonment may not be sufficient to protect a corporate defendant from misuse of governmental power.

The Supreme Court has explained that the reason for requiring counsel in criminal prosecutions is that "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him."⁴²⁶ The government's power to seize assets before trial raises the troubling possibility that it may seek to use that power to prevent a corporation from defending itself because the business does not have the right to appointed counsel under the Sixth Amendment.⁴²⁷ Disabling corporate financial resources through an asset seizure makes a guilty plea the only plausible alternative for the corporation to free its assets, if it cannot defend itself by hiring an attorney.

The possibility of coercive action against a corporation, aided by an asset seizure that prevents a company from having adequate legal representation, would be a significant harm. Therefore, at least in that narrow circumstance, a court should recognize the corporation's right to invoke the Sixth Amendment and have counsel appointed for it.⁴²⁸ Moreover, the corporation's right to counsel should not depend on showing that the government seized the assets with the intent to deprive the corporation of counsel because a corporate defendant does not have the ultimate protection of the right to appointed counsel.⁴²⁹

617 (1989), which held that there is no violation of the right to counsel when the government lawfully seizes assets before trial that a defendant would use to retain counsel. *Monsanto*, 491 U.S. at 616; *Caplin & Drysdale*, 491 U.S. at 632. In order to avoid finding a general corporate right to counsel through the use of seized assets, *Unimex* provided only the very narrow protection that a court must hold a pretrial hearing on the propriety of the government's seizure at which the corporation has the right to counsel.

426. *Gideon*, 372 U.S. at 344.

427. *Cf. United States v. Route 2*, Box 472, 60 F.3d 1523 (11th Cir. 1995) (government sought *in rem* forfeiture of all the corporation's land based on the illegal acts of a shareholder who owned 68% of the stock).

428. The contortions required to reach a similar result in *Unimex* show that a direct weighing of the need to protect the corporation is the more satisfactory analysis.

429. In *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989), the Court held that the government's *potential* power to abuse the asset forfeiture provisions to deprive defendants of the counsel of their choice did not constitute a violation of the right to counsel.

The government already assumes the cost of providing counsel for individual defendants, and given the rare circumstance under which a corporation can qualify for appointed counsel, extending that right to a corporate defendant would not entail significantly higher costs. The corporate defendant's need for counsel is vital because the organization can only appear in court through counsel to challenge the seizure and defend itself in the criminal action; corporations generally cannot appear *pro se*.⁴³⁰ Even if the government charges a corporation along with one of its officers or employees in the same proceeding, they may have conflicting interests, such as mutually exclusive defenses. In that circumstance, the individual officer's attorney could not adequately represent the corporation. Moreover, the presence of counsel for the corporation is unlikely to have any significant effect on the government's power to investigate and prosecute violations. Counsel for the corporation would simply ensure a fair adjudication.

The obvious problem with recognizing a corporation's Sixth Amendment rights in the limited circumstance where the government's asset freeze or seizure deprived the corporation of the ability to retain counsel is the Supreme Court's clear limitation of the right to appointed counsel to cases involving actual imprisonment. One solution would be to adopt the analysis used for criminal contempt cases involving a "serious" fine for a corporate Sixth Amendment claim. In *Bagwell*, the Supreme Court dispensed with the exclusive focus on the potential punishment for determining the jury trial right to accord corporations constitutional protection in a special circumstance that involved a substantial danger that the government could misuse its prosecutorial power. Such an approach for the right to appointed counsel for a corporation that cannot retain counsel due to the government's action to restrain corporate assets would not damage the predominant Sixth Amendment analysis that generally excludes corporations from having the right to appointed counsel. Creating a narrow exception that recognizes the limited circumstance in which a corporate defendant can invoke the constitutional protection comports with the broader approach to corporate

Id. at 634. The underlying premise of the analysis was that the Sixth Amendment required the government to provide counsel if the asset forfeiture caused a defendant to lose the economic means to retain an attorney. A corporate defendant whose assets have been seized and cannot retain counsel has no right to appointed counsel, and therefore the Court's approach in *Caplin & Drysdale* should not prevent finding a potential Sixth Amendment violation when the asset forfeiture effectively denies the right to counsel. The Court could uphold the validity of the forfeiture by extending the constitutional requirement that counsel be appointed to the corporation, despite the fact that the corporation cannot be incarcerated, to supply the missing component from *Caplin & Drysdale*'s Sixth Amendment analysis.

430. *Cf.* FED. R. CRIM. P. 43(c)(1) ("A corporation may appear by counsel for all purposes.").

criminal constitutional rights that grants a right to prevent a substantial abuse of governmental power.

VII. CONCLUSION

Hale v. Henkel established that a corporation does not have all of the criminal constitutional rights granted to individuals. The Framers of the Constitution did not explicitly include corporations within the protection of its provisions.⁴³¹ Because of the lack of any clear analysis for applying the constitutional protections to corporations, the Supreme Court has struggled with the scope of the various provisions applicable to criminal defendants.

Hale v. Henkel provided the foundation for analyzing corporate criminal constitutional rights. Under *Hale v. Henkel*, a corporation cannot claim the same measure or degree of protection that the individual defendant may claim, but the corporation is not bereft of all constitutional rights in a criminal prosecution. The scope of a corporation's protection depends on weighing the effect of recognizing the corporate right on the government's enforcement program with the possibility that, absent the constitutional protection, the government will misuse its power unfairly to convict and sanction a corporate defendant. *Hale v. Henkel's* analysis should be extended to determine whether a corporate defendant can invoke the protection of other criminal constitutional rights. Indeed, that approach is reflected in later cases involving the rights of corporations and other business organizations under the Self-Incrimination Clause and the Fourth Amendment.

Applying *Hale v. Henkel's* analysis to corporate criminal constitutional rights demonstrates that the Court's initial approach to a corporation's rights in a criminal matter was not an aberration or the result of a political choice to further the populist sentiment against corporate excess. That case comes to a seemingly odd result, denying one constitutional protection to an entity that is subject to criminal punishment just like any individual while recognizing another when both provisions apply to "persons." Yet, *Hale v. Henkel* reflects the reality that corporations are not the same as individuals and may not lay claim to every constitutional right and privilege accorded to the individual.

The Constitution grants significant protection to the individual, even at the cost of permitting some guilty defendants to avoid prosecution, because the rights serve the important social value of protecting the individual from the government's misuse of its power. Granting the same protection to the

431. Mayer, *supra* note 8, at 579 ("The Constitution does not mention corporations."). Professor Mayer pointed out that the Framers were probably aware of the existence of corporations, which were chartered at that time by state legislatures for limited purposes. *Id.* at 579 n.8.

corporation, which can operate through a number of different agents and can transmute its form virtually at will, would ultimately confer so much protection that the criminal prosecution of the corporation could be unduly frustrated. The philosophical status of the corporation as a legal being, whether it be a "real" or an "artificial" entity, does not confer constitutional rights. Instead, the question is how much protection is "appropriate" for a corporation.⁴³² That inquiry, first undertaken in *Hale v. Henkel*, points out the importance of considering corporate claims to constitutional protection in criminal prosecutions not on the basis that the corporation is the same as the individual. Instead, the Court should acknowledge that corporate criminal constitutional rights present a special case that requires careful consideration to determine whether, and not just how much, constitutional protection the Constitution affords.

432. In a famous essay attacking the debate over whether a corporation was a "person" or not, John Dewey states: "In saying that 'person' might legally mean whatever the law makes it mean, I am trying to say that 'person' might be used simply as a synonym for a right-and-duty-bearing unit. Any such unit would be a person; such a statement would be truistic, tautological." John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 656 (1926). Dewey's attack on theorizing about the nature of the corporation "muzzled the arguments on corporate personhood which had raged for more than two decades." Hager, *supra* note 52, at 635.